Form No. 7

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No. 4351

1417

1411

# United States Circuit Court of Appeals

## For the Ninth Circuit.

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EDWARD JOSEPH HAGEN,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

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# Transcript of Record.

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**Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.**

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4351

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF COUNSEL.

FRED C. BROWN, Esq., 201 Lyon Building, Seattle, Washington,
Attorney for Plaintiff in Error.

THOS. P. REVELLE, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error.

C. T. McKINNEY, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error. [1*]

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United States District Court, Western District of Washington, Northern Division.
November, 1922 Term.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED. J. HAGEN, ED. W. PIELOW, CHARLES GIVENS, and CHRIS BROWN,
Defendants.

INDICTMENT.

Conspiracy to Violate—Vio. Sec. 37 Penal Code, Act of Oct. 28, 1919, National Prohibition Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America,

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*Page-number appearing at foot of page of original certified Transcript of Record.

being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That Ed. J. Hagen, Ed. W. Pielow, Charles Givens and Chris Brown, and each of them, on the fifteenth day of December, in the Year of our Lord One Thousand Nine Hundred and Twenty-two at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully and feloniously combine, conspire, confederate and agree together, and one with the other, and together with divers other persons to the grand jurors unknown, to commit certain offenses against the United States, that is to say, to violate the provisions of the Act of Congress passed October 28, 1919, and known as the National Prohibition Act, it being then and there the plan, purpose and object of said conspiracy [2] and the object of said persons so conspiring together as aforesaid and hereinafter referred to as the conspirators to knowingly, willfully and unlawfully possess, transport and sell certain intoxicating liquors, to wit, whiskey, gin and divers other liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, such possession and transportation being intended

by them, the said conspirators, for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said intoxicating liquors in violation of the National Prohibition Act, such possession, transportation and sale of said intoxicating liquors by them, the said conspirators as aforesaid being unlawful and prohibited by the said Act of Congress.

That the conspiracy was and is a continuing conspiracy continuing from, to wit, the fifteenth day of December, 1922, to the time of the presentment of this indictment.

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, Ed. J. Hagen, Ed W. Pielow, Charles Givens, and Chris Brown, did from the fifteenth day of December, 1922, to the time of the presentment of this indictment, rent, maintain and control in Seattle, Washington, a dwelling-house located at 620 Broadway, Seattle, Washington, in said division and district. [3]

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirator Ed. J. Hagen, on the nineteenth day of February, 1923, at Seattle, in said division and district, then and there being,

did then and there knowingly, willfully and unlawfully sell certain intoxicating liquors, to wit, twelve (12) bottles each containing one-fifth of a gallon of a certain liquor known as whiskey, and twelve (12) bottles each containing one-fifth of a gallon of a certain liquor known as gin, all of said liquors then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, which said sale of said intoxicating liquors by the said Ed. J. Hagen as aforesaid was then and there unlawful and prohibited by the National Prohibition Act.

3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirator, Charles Givens, on the nineteenth day of February, 1923, at Seattle, in said division and district, then and there being, did then and there knowingly, willfully and unlawfully cause to be transported and delivered for sale certain intoxicating liquors, then and there containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, said transportation and delivery for sale being then and there unlawful and prohibited by the National Prohibition Act. [4]

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, Ed. J. Hagen, and Ed. W. Pielow, and each of them, between the fifteenth day of December, 1923, and the twentieth day of February, 1923, at Seattle, Washington, in said division and district, then and there being, did make and enter in writing accounts showing the daily receipts and expenditures of money by the said conspirators, namely, Ed J. Hagen, Ed W. Pielow, Charles Givens and Chris Brown.

5. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators Ed. J. Hagen, Ed. W. Pielow, Charles Givens and Chris Brown, on the twentieth day of February, 1923, at Seattle, Washington, in said division and district then and there being, and each of them, did then and there knowingly, willfully and unlawfully have and possess certain intoxicating liquors to wit, four (4) bottles then and there containing one-fifth of one gallon each of a certain intoxicating liquor known as whiskey, eight (8) bottles then and there containing each one (1) pint of a certain intoxicating liquor known as beer, all of said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more

particular description of the amount and kind whereof being to the grand jurors unknown, such possession being intended by them, the said conspirators, for the purpose of violating the National Prohibition Act, by selling, bartering, [5] exchanging, giving away, furnishing and otherwise disposing of said intoxicating liquors in violation of the National Prohibition Act, such possession as aforesaid of said intoxicating liquors by them, the said conspirators, as aforesaid, being unlawful and prohibited by the said Act of Congress; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE.
THOS. P. REVELLE,
United States Attorney.
De WOLFE EMORY,
Special Assistant United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court. March 8, 1923. F. M. Harshberger, Clerk. [6]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED. W. PIELOW, CHARLES GIVENS, and CHRIS BROWN,

Defendants.

## MOTION TO QUASH INDICTMENT.

Come now the defendants herein, by George F. Vanderveer, their attorney, joining in this motion solely for reasons of convenience, and severally move the Court on the files and records herein, and on the attached affidavit of George F. Vanderveer, for an order quashing the indictment herein, upon the ground and for the reason that the United States District Attorney and his assistants submitted to the Grand Jury which returned said indictment a large number of letters, books, papers, memoranda, cards and accounts and a number of bottles of intoxicating liquors unlawfully seized in the possession of the defendants Ed W. Pielow, Charles Givens and Chris Brown at their dwelling at No. 122 Broadway, Seattle, Washington, upon a void search-warrant, directing a search of the premises of the defendant Ed Hagen; that said seizure was made for the purpose of forcibly procuring evidence from said defendants to be used against them on a prosecution for a felony; that the evidence so

obtained and submitted to the Grand Jury as aforesaid became the very basis for the indictment herein, without which the United States District Attorney cannot successfully prosecute the same; that all said matters have been done in violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States, and that the Government ought not to be subjected to further [7] discredit and expense, nor the defendants subjected to further expense, vexation and contumely by the prosecution of a bill of indictment so found and returned.

G. F. VANDERVEER,
Attorney for Defendants. [8]

EXHIBIT "A."

Local Form No. 103,
United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and his deputies, or either of them, and to any National Prohibition Officer or Agent, or the Federal Prohibition Director, of the States of Washington, or any Federal Prohibition Agent of this state, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents, or inspectors, GREETINGS:

WHEREAS, Gordon B. O'Harra, a Federal Pro-

hibition Agent of the State of Washington, has this day made application for a Search-Warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington, charging that a crime is being committed against the United States in violation of the National Prohibition Act of Congress by one ED. HAGEN, who was, has been and is at said time and place possessing, and selling intoxicating liquor, all for beverage purposes, on certain premises in the City of Seattle, County of King, State of Washington, and in said District, more fully described as

122 Broadway, Seattle, Wash.,

and on the premises used, operated and occupied in connection therewith, all said premises being occupied by ED. HAGEN AND EMPLOYEES,

AND WHEREAS, the Undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary, in the daytime, or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said ED. HAGEN AND EMPLOYEES, and from him or her, or from said premises seize any or all of the said

property so used in or about the commission of said crime, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 20 day of February, 1923.

[Seal] A. C. BOWMAN,
United States Commissioner, Western District of Wash.

RETURN OF SEARCH-WARRANT.

Returned, this 21 day of Feb., A. D., 1923.

Served, by making search as within directed, upon which search I found 3-⅕ gal. bottles of gin; ½ pint Pebbleford whiskey; ⅕ gal. bottle Scotch whiskey; 8 bottles Canadian beer; 14 bottles home brew beer; various letters, books, papers, memoranda, cards, accounts dealing with liquor traffic in immediate possession of various defendants, and duly inventoried the same as above, according to law.

(Signed) GORDON B. O'HARRA.
(Signature)

I, Gordon B. O'Harra, the officer by whom this warrant was executed do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

(Signed) GORDON B. O'HARRA.
(Signature)

Subscribed and sworn to before me this 23d day of February, 1923.

A. C. BOWMAN,
United States Commissioner.

Western District of Washington,
United States of America,
Western District of Washington,—ss.

I certify the foregoing to be a true copy of the original search-warrant (and endorsements), issued by me on the date named therein.

(Signed) A. C. BOWMAN,
U. S. Commissioner.

Seattle, Wn., Feb. 28, 1923. [9]

EXHIBIT "B."

Local Form 100.
United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT.

Gordon B. O'Harra being first duly sworn on his oath deposes and says: That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress has been and is being committed in this, that in the City of Seattle, County of King, State of Washington, and within the said District and Division above named, one

ED. HAGEN AND EMPLOYEES

on the 20th day of February, 1923, and thereafter was, has been and is possessing and selling intoxi-

cating liquor, all for beverage purposes, on premises described as

122 Broadway, Seattle, Wash.,

and on the premises used, operated and occupied in connection therewith, all being in the County of King, State of Washington, and in said District, and all of said premises being occupied or under the control of ED HAGEN AND EMPLOYEES, All in violation of the Statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, this said affiant hereby asks that a Search-Warrant be issued directed to the United States Marshal for the said District, and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said Ed. Hagen and employees, and the premises above described, and seizure of any and all of the above described property and intoxicating liquor and means of committing the crime aforesaid, all as provided by law and said act.

(Signed) GORDON B. O'HARRA.

Subscribed and sworn to before me this 20th day of February, 1923.

[Seal] (Signed) A. C. BOWMAN,
United States Commissioner, Western District of Wash.

United States of America,
Western District of Washington,—ss.

I certify the above to be a true copy of the original application and affidavit for search-warrant in said matter.

March 3, 1923.

[Seal] (Signed) A. C. BOWMAN,
U. S. Commissioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 14, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED. J. HAGEN, ED. W. PIELOW, CHARLES GIVENS and CHRIS BROWN,
Defendants.

ORDER DENYING MOTION TO QUASH INDICTMENT.

The several motions of the defendants herein to quash the indictment herein having coming duly

on for hearing before the Honorable Jeremiah Neterer, District Judge, the plaintiff appearing by Mr. DeWolfe Emory, Assistant United States Attorney, the defendants appearing by Mr. G. F. Vanderveer, their attorney, the Court having heard all arguments of counsel and duly considered the brief submitted in support of and in opposition to said motions, now, on motion of the plaintiff,—

IT IS ORDERED that said motions to quash be and the same hereby are denied.

To the denial of said motions to quash each of said defendants hereby severally takes exception and his exception is hereby allowed.

Done in open court this 1st day of May, 1923.

JEREMIAH NETERER,
District Judge.

Copy received this 1st day of May, 1923.

DeW. EMORY,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 1, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED. J. HAGEN, ED. W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

## PETITION FOR RETURN OF PROPERTY.

To the Honorable JEREMIAH NETERER, District Judge:

Your petitioner, Ed. W. Pielow, respectfully represents that he is one of the defendants in the above-entitled cause; that at all the times hereinafter mentioned he resided at 122 Broadway, Seattle, Washington; that said premises are and were a private dwelling and at all the times herein mentioned were occupied exclusively as such; and that at no time was any part of said premises used for any business purposes such as a store, shop, saloon, restaurant, hotel or boarding-house, nor was any intoxicating liquor sold or kept for sale therein.

Your petitioner avers that on the 20th day of February, 1923, in the night-time, William M. Whitney, a Federal prohibition agent, and other United States officers to your petitioner unknown, entered your petitioner's aforesaid dwelling and

over your petitioner's protest and objections, seized therein and removed therefrom a large number of letters, books, papers, memoranda, cards and accounts then and there in your petitioner's lawful custody and possession; and your petitioner is informed and believes that said William M. Whitney and his assistants aforesaid seized said property and took the same into their possession for the purpose of procuring evidence against your petitioner and other persons on a charge of crime; that thereafter they were delivered by the said William [12] M. Whitney to the United States District Attorney, for the Western District of Washington, in whose possession they still are; that they were then submitted to and considered by the Grand Jury of this Court which returned the indictment herein and that the United States District Attorney intends to use the same upon the trial of said indictment, all in violation of your petitioner's rights under the Fifth Amendment to the Constitution of the United States.

Your petitioner further avers that in making said seizure said William M. Whitney and his assistants acted under the pretended authority of a search-warrant issued by A. C. Bowman, United States Commissioner for the Western District of Washington, a copy of which, together with the official return endorsed thereon, is hereto attached and made a part hereof by this record and marked Exhibit "A."

Your petitioner further avers that said search-warrant was issued by said United States Commis-

sioner solely upon the affidavit of one Gordon B. O'Harra, a federal prohibition agent, a copy of which affidavit is hereto attached and made a part hereof by this reference and marked Exhibit "B."

And your petitioner respectfully represents that said search-warrant was wholly irregular and void and was issued and executed in violation of the Fourth and Fifth Amendments to the Constitution of the United States and of Title XI of the Act of Congress of June 15, 1917, commonly known as the Espionage Act, and of the Act of Congress of October 28, 1919, commonly known as the National Prohibition Act, for all of the following reasons:

1. Said warrant was issued and executed for the purpose of procuring from your petitioner's possession evidence upon which to indict and prosecute him for felony, in violation of the Fifth Amendment to the Constitution of the United States. [13]

2. Said search-warrant was issued and employed to search a private dwelling occupied as such by your petitioner, in violation of Section 25 of the National Prohibition Act.

3. Said search-warrant directed the search of your petitioner's premises in the night-time; and said search and seizure were made in the night-time, in violation of the provisions of Section 10 of Title XI of the Espionage Act.

4. That said search-warrant was void because neither the warrant itself, nor the affidavits upon which it was issued, named the owner or occupant of the premises to be searched, nor described with

reasonable particularity, or at all, the property to be seized, or the property which was seized thereunder.

5. Said search-warrant was void because the affidavit upon which the same was issued did not set forth any facts tending to establish the grounds of the application, nor any facts from which said United States Commissioner could determine that said grounds existed.

In further support of his petition, your petitioner avers that at no time did Ed. Hagen occupy, or have any interest in, the premises aforesaid, nor was your petitioner ever an employee of said Ed. Hagen.

WHEREFORE your petitioner prays an order, directing the United States District Attorney to return to him his property aforesaid.

G. F. VANDERVEER,
Attorney for Petitioner. [14]

State of Washington,
County of King,—ss.

G. F. Vanderveer, being first duly sworn, on oath deposes and says: that he is the attorney for the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true except as to those matters therein alleged on information and belief and as to those matters he believes it to be true.

G. F. VANDERVEER.

Subscribed and sworn to before me this 1" day of May, 1923.

[Seal] C. A. DYCK,
Notary Public in and for the State of Washington,
Residing at Seattle.

I acknowledge receipt of a copy of above this 1st, day of May, 1923.

DeW. EMORY,
Asst. U. S. Atty. [15]

EXHIBIT "A."

Local Form No. 103.
United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and his deputies, or either of them, and to any National Prohibition Officer or Agent, or the Federal Prohibition Director, of the State of Washington, or any Federal Prohibition Agent of this state, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents, or inspectors, GREETINGS:

WHEREAS, Gordon B. O'Harra, a Federal Prohibition Agent of the State of Washington, has this day made application for a Search-Warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington,

charging that a crime is being committed against the United States in violation of the National Prohibition Act of Congress by one ED. HAGEN who was, has been and is at said time and place possessing, and selling intoxicating liquor, all for beverage purposes, on certain premises in the City of Seattle, County of King, State of Washington, and in said District, more fully described as

122 Broadway, Seattle, Wash.,

and on the premises used, operated and occupied in connection therewith, all said premises being occupied by ED. HAGEN AND EMPLOYEES

And WHEREAS, the Undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary, in the day-time, or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said ED. HAGEN AND EMPLOYEES, and from him or her, or from said premises seize any or all of the said property *to* used in or about the commission of said crime, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 20th day of February, 1923.

[Seal] A. C. BOWMAN,
United States Commissioner, Western District of Wash., [16]

RETURN OF SEARCH-WARRANT.

Returned this 21 day of Feb. A. D. 1923.

Served, by making search as within directed, upon which search I found 3-1/5 gal. bottles gin; ½ pint Pebbleford whiskey; 1/5 gal. bottle Scotch Whiskey; 8 bottles Canadian beer; 14 bottles home brew beer; various letters, books, papers, memoranda, cards, accounts dealing with liquor traffic in immediate possession of various defendants, and duly inventoried the same as above, according to law.

(Signed) GORDON B. O'HARRA.
(Signature.)

I, Gordon B. O'Harra, the officer by whom this warrant was executed do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

(Signed) GORDON B. O'HARRA.
(Signature.)

Subscribed and sworn to before me this 23d day of February, 1923.

A. C. BOWMAN,
United States Commissioner.

Western District of Washington,
United States of America,
Western District of Washington,—ss.

I certify the foregoing to be a true copy of the original search-warrant (and endorsements) issued by me on the date named therein.

(Signed) A. C. BOWMAN,
U. S. Commissioner.

Seattle, Wn., Feb. 28, 1923.

EXHIBIT "B."

Local Form 100.
United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT.

Gordon B. O'Harra being first duly sworn on his oath deposes and says: That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said district; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress has been and is being committed in this, that in the city of Seattle, county of King, State of Washington, and within the said district and division above named, one

ED HAGEN AND EMPLOYEES

on the 20th day of February, 1923, and thereafter was, has been and is possessing and selling intoxicating liquor, all for beverage purposes, on premises

described as 122 Broadway, Seattle, Wash., and on the premises used, operated and occupied in connection therewith, all being in the county of King, State of Washington, and in said district, and all of said premises being occupied or under the control of Ed Hagen and employees, all in violation of the statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, this said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said district, and his deputies, and to any National Prohibition Officer or Agent or Deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said Ed Hagen and employees, and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor and means of committing the crime aforesaid, all as provided by law and said act.

(Signed) GORDON B. O'HARRA.

Subscribed and sworn to before me this 20th day of February, 1923.

[Seal] (Signed) A. C. BOWMAN,
United States Commissioner.

United States of America,
Western District of Washington,—ss.

I certify the above to be a true copy of the origi-

nal application and affidavit for search-warrant in said matter.

(Signed) A. C. BOWMAN,
U. S. Commissioner.

March 3, 1923.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 1, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,
Defendants.

## ORDER DENYING PETITION FOR RETURN OF PROPERTY.

The petition of the defendant, Ed. W. Pielow, for the return of certain letters, books, papers, memoranda, cards and accounts taken from his possession, having come duly on for hearing before the Honorable Jeremiah Neterer, District Judge, the petitioner appearing by Mr. G. F. Vanderveer, his attorney, the plaintiff appearing by Mr. DeWolfe Emory, Assistant United States Attorney, the Court having considered the arguments of counsel and

being now fully advised in the premises, on motion of the plaintiff,

IT IS ORDERED that said petition be and the same hereby is denied.

To the denial of said petition said Ed W. Pielow duly takes exception and his exception is hereby allowed.

Done in open court this 1st day of May, 1923.

JEREMIAH NETERER,
District Judge.

Copy received this 1st day of May, 1923.

DeW. EMORY,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 1, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

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In the United States District Court for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD JOSEPH HAGEN, EDWARD WHEELER PIELOW, CHARLES ANDREW GIVENS and CHRISTOPHER BROWN,
Defendants.

VERDICT.

We, the jury in the above-entitled cause, find the defendant, Edward Joseph Hagen, is guilty as charged in the indictment herein; and further find the defendant, Edward Wheeler Pielow is guilty as charged in the indictment herein; and further find the defendant, Charles Andrew Givens is guilty as charged in the indictment herein; and further find the defendant Christopher Brown not guilty as charged in the indictment herein.

JOHN DOLAN,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

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In the United States District Court for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD JOSEPH HAGEN,
Defendant.

SENTENCE.

Comes now on this 24th day of March, 1924, the said defendant, Edward Joseph Hagen into open

court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violation of Section 37 Penal Code of the United States, conspiracy to violate the Act of October 28, 1919, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of two years at hard labor. And the said defendant, Edward Joseph Hagen, is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book, page 82. [20]

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United States District Court, Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

## MOTION FOR NEW TRIAL.

Come now the defendants by G. F. Vanderveer, their attorney, and severally move the Court on the files and records herein for an order setting aside the verdict of the jury herein and granting them a new trial on the following grounds:

I.

Irregularity in the proceedings of the Court, jury and plaintiff; orders of the Court; and abuse of discretion; by which the defendants were prevented from having a fair trial.

II.

Insufficiency of the evidence to justify the verdict, and that it is against law.

III.

Error in law occurring at the trial and in the Court's ruling upon the petitions for the suppression of evidence and the motions to quash the indictment herein and duly excepted to at the time by the defendants.

G. F. VANDERVEER,
Attorney for Defendants.

Copy of within motion for new trial received and due service of the same acknowledged this 11 day of Mar. 1924.

THOS. P. REVELLE,
Attorney for Ptff.
M. M.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Mar. 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy; [21]

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United States District Court, for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

ORDER DENYING MOTIONS FOR NEW TRIAL.

The several motions of the defendants for a new trial having come duly on for hearing on the 24th day of March, 1924, the Court having heard the arguments of counsel and being fully advised in the premises,

IT IS ORDERED that said motions be and the same hereby are denied.

Each of the defendants is allowed an exception hereto.

Done in open court this 25th day of March, 1924.

JEREMIAH NETERER,

District Judge.

Received a copy of the within order this 25th day of March, 1924.

THOS. P. REVELLE,
Attorney for Ptff.
M. M.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 25, 1924. F. M. Harshberger, By S. E. Leitch, Deputy. [22]

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United States District Court, for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,
Defendants.

MOTION FOR RECONSIDERATION OF MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled action and severally move the Court on the files and records herein and on the attached affidavit of G. F. Vanderveer for a reconsideration of their motion for a new trial herein and for an order vacating the verdict and granting them a new trial on the grounds specified in said motion and on the additional ground of unavoided casualty and miscon-

duct preventing them from having a fair trial, and more particularly because, as more fully specified in the affidavit of said G. F. Vanderveer, there were submitted to the jury that tried said case and there were considered by said jury in arriving at their verdict a large number of envelopes containing inscriptions highly prejudicial to the defendants which were not admitted in evidence nor supported by any testimony in the case.

G. F. VANDERVEER,
Attorney for Defendants. [23]

United States District Court, for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,
Defendants.

AFFIDAVIT OF G. F. VANDERVEER.

State of Washington,
County of King,—ss.

G. F. Vanderveer, being first duly sworn, says that he is the attorney for the defendants in the above-entitled cause; that on the trial of said cause a great many cards, sales slips, memoranda and other documents were identified by various witnesses as papers taken from the possession of either

the defendant Ed J. Hagen or Ed W. Pielow or from the room of one Anna Givens; that among other exhibits so identified were the following, to wit:

Government's Exhibit 6, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 7, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 8, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 10, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 13, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 14, consisting of a bundle of slips taken from the room of Anna Givens. [24]

Government's Exhibit 11, consisting of papers taken from the person of the defendant Hagen.

Government's Exhibit 12, consisting of papers taken from the person of the defendant Hagen.

Government's Exhibit 15, consisting of a memorandum-book and other papers taken from the possession of the defendant Hagen.

Government's Exhibit 18, consisting of papers taken from the possession of the defendant Hagen.

Government's Exhibit 20, consisting of other papers which on account of the present

scrambled condition of the exhibits deponent is not able to specifically identify.

Government's Exhibit 21, consisting of cards taken from the possession of defendant Hagen.

That deponent carefully examined all of said papers and documents as they were identified by the several witnesses and none of them were then enclosed in any envelopes or other containers, nor were any envelopes or other containers identified by the witnesses as a part of the exhibits.

Deponent estimates that more than two hundred separate articles, papers and documents of various kinds were thus identified and admitted in evidence, and alleges that at all times between the date of their seizure by Government officials on February 20, 1923, and the trial of said cause all of said exhibits were in the secret custody of Government officials, and on account thereof deponent neither had nor sought an opportunity to examine them or study their contents; that because of their great volume deponent made no attempt to study said exhibits during the progress of the trial nor did he examine or comment on any of them in the course of his argument to the jury, and for all of said reasons deponent had no [25] occasion to, nor did he, ever inspect said exhibits after their identification by the various witnesses until the 27th day of March, 1924, when, in the course of preparing the defendants' proposed bill of exceptions herein, he secured the same from F. M. Harshberger, the Clerk of the above-entitled court, for

the purpose of preparing a descriptive list to supplement the transcript of testimony theretofore furnished him by the court reporter; and upon examination discovered for the first time, to his great surprise, that all of the exhibits hereinabove referred to, except in so far as they had become disarranged, were contained in envelopes bearing in their upper left-hand corner the printed return address:

"Office of United States Attorney, Seattle, Wash.," and certain other inscriptions in writing as follows:

Upon Government's Exhibit 6 the inscription: "Slips showing purchases."

Upon Government's Exhibit 7 the inscription: "Expenses."

Upon Government's Exhibit 8 the inscription: "Withdrawals by Hagen."

Upon Government's Exhibit 9 the inscription: "Slips showing withdrawals by Charley."

Upon Government's Exhibit 10 the inscription: "20th Slip on day of arrest—Sales slip."

Upon Government's Exhibit 11 the inscription: "Rainier Club Sales Slip."

Upon Government's Exhibit 12 the inscription: "Slips showing Expense—See Slip as to charity."

Upon Government's Exhibit 13 the inscription: "Slips showing def. handwriting and Anna's handwriting."

Upon Government's Exhibit 14 the inscription in red lead pencil: "Payments on the 31st —withdrawals Feb. 10th," and in [26]

black lead pencil the additional inscription: "Slip showing withdrawal of money by Hagen & Pielow—See last page of big ledger."

Upon Government's Exhibit 15 the inscription: "138.00 taken from Load. Hagens person."

Upon Government's Exhibit 18 the inscription: "From Hagens person."

Upon Government's Exhibit 20 the inscription: "Deposit slip to credit Con—Exp. Canada—Hagen had on person. Bill came from Pielow's room 'Fred Moore' Bill."

And upon Government's Exhibit 21 the inscription:

"E11 4583W )
E11 5911 ) Same No.
Card with Secret No. on it presented by Ed Hagen—Hagens Person."

That at the same time deponent found Government's Exhibit No. 17 enclosed in an envelope bearing the return printed address:

"Treasury Department Office of Federal Prohibition Director, Tacoma, Wash.," which also bore the following inscription: "U. S. vs. Ed Hagen from his person to be photographed."

That deponent immediately inquired of said F. M. Harshberger whether said envelopes had been submitted to the jury with their contents and was informed that they had; and deponent alleges on such information that all of said envelopes were taken by the jury to their jury-room and considered in their deliberations upon the verdict. That there-

after deponent exhibited the envelopes containing Government's Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20 and 21 to Mr. C. T. McKinney, the Assistant United States Attorney who tried said case in behalf of the Government, and inquired if he knew the handwriting thereon, whereupon said Mr. C. T. McKinney informed him that it was [27] his own handwriting; and deponent then exhibited to Mr. Gordon B. O'Harra, a federal prohibition agent, the envelope containing Government's Exhibit 17 with a similar inquiry and was informed by him that in his opinion the writing thereon was in the handwriting of William M. Whitney, Assistant Prohibition Director of the State of Washington.

That immediately thereafter deponent presented said matter to the above-entitled court substantially in the manner recited in this affidavit with the request that all of said documents be compounded, which said Court thereupon ordered done.

Deponent makes this affidavit in support of the defendant's motion for a new trial.

G. F. VANDERVEER.

Subscribed and sworn to before me this 29th day of March, 1924.

[Seal] C. A. DYCK,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within motion this 29 day of March, 1924.

THOS. P. REVELLE,
M. M.,
Attorney for Ptff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 29, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

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United States District Court, for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,
Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION OF MOTION FOR NEW TRIAL.

The defendants' motion for a reconsideration of their motion for a new trial and for an order granting their motion for a new trial having come on for hearing, the Court having heard the arguments of counsel, being now fully advised in the premises, and having heretofore filed a written opinion denying said motion,—

IT IS NOW CONSIDERED AND ORDERED that said motion be and the same hereby is denied.

To the foregoing order each of the defendants hereby excepted and his exception is hereby allowed.

Done in open court this 26th day of April, 1924, as of Apr. 25th, 1924.

JEREMIAH NETERER,
District Judge.

Received a copy of the within order this 26th day of April, 1924.

THOS. P. REVELLE,
M. M.,
Attorney for Ptff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,
Defendants.

PETITION FOR WRIT OF ERROR OF ED J. HAGEN.

To the Honorable JEREMIAH NETERER, Judge of the Above-entitled Court:

The petition of Ed J. Hagen, by his attorney

Fred C. Brown, respectfully shows that on the 24th day of March, 1924, the United States District Court for the Western District of Washington, Northern Division, gave judgment against your petitioner in the above-entitled cause, wherein as appears from the face of the record of the proceedings therein certain errors were committed which are more fully set forth in the assignments of error presented herewith.

Now, therefore, to the end that said matters may be reviewed and said errors corrected by the Circuit Court of Appeals for the Ninth Circuit, your petitioner prays for an allowance of a writ of error and such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable Justices of the Circuit Court of Appeals for the Ninth Circuit for review and correction; and that an order be made staying and suspending all further proceedings herein pending the determination of said writ of error by said Circuit Court of Appeals.

FRED C. BROWN,
Attorney for Ed J. Hagen.

Received a copy of the within petition this 23d day of April, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

ORDER ALLOWING WRIT OF ERROR.

The plaintiff in error having duly presented his petition for writ of error and assignments of error and a writ of error to the Circuit Court of Appeals, having duly issued and the Court having fixed the bond of the plaintiff in error in the sum of four thousand dollars ($4,000.00), and said bond having been duly filed and approved; now, on motion of the plaintiff in error,

IT IS ORDERED that execution of the judgment herein be stayed pending the determination of said writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 25th day of April, 1924.

JEREMIAH NETERER,

District Judge.

Received a copy of the within order this 23d day of April, 1924.

THOS. P. REVELLE,

Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [31]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

## ASSIGNMENT OF ERRORS OF ED J. HAGEN.

Now comes the defendant, Ed J. Hagen, by Fred C. Brown, his attorney, and in connection with his petition for a writ of error herein assigns the following errors, which he avers occurred in the trial of said cause, which were duly excepted to by him, and upon which he relies to reverse the judgment entered against him herein:

I.

The District Court erred in denying the defendant's motion to quash the indictment herein on the ground that said indictment was founded upon documents and other articles seized in the residence without authority in law in violation of his rights

under the Fourth Amendment to the Constitution of the United States.

II.

The District Court erred in denying the defendant's petition for the return of documents, liquor and other articles seized by United States Government Prohibition officers in the residence on the night of February 20, 1923, in violation of his rights under the Fourth Amendment to the Constitution of the United States.

III.

The District Court erred in denying the defendant's motion for a directed verdict of not guilty made at the close of the evidence on the ground that there was no evidence to prove a conspiracy between the defendants or to prove any overt act on the part of any defendant as charged in the indictment. [32]

IV.

The District Court erred in denying the defendant's motion for a new trial.

V.

The District Court erred in pronouncing judgment upon the defendant.

VI.

The District Court erred in admitting in evidence Plaintiff's Exhibit No. 2, being a ledger purporting to record their transactions in the sale of intoxicating liquors, and in overruling the defendant's objection thereto on the grounds that the same had been forcibly seized and taken from the residence in the night-time by United States Government pro-

hibition agents without lawful authority and in violation of his rights under the Fourth Amendment to the Constitution of the United States; and that its reception in evidence was a violation of his rights under the Fifth Amendment to the Constitution of the United States, the same being one of the documents for the return of which the defendant had made timely application on the ground of such unlawful seizure.

For the reasons set forth in the sixth assignment of error and which are for convenience incorporated herein by reference.

The District Court also erred as follows:

VII.

In admitting in evidence Government Exhibit No. 3.

VIII.

In admitting in evidence Government Exhibit No. 4.

IX.

In admitting in evidence Government Exhibit No. 5.

X.

In admitting in evidence Government Exhibit No. 6.

XI.

In admitting in evidence Government Exhibit No. 7. [33]

XII.

In admitting in evidence Government Exhibit No. 8.

XIII.

In admitting in evidence Government Exhibit No. 9.

XIV.

In admitting in evidence Government Exhibit No. 10.

XV.

In admitting in evidence Government Exhibit No. 11.

XVI.

In admitting in evidence Government Exhibit No. 12.

XVII.

In admitting in evidence Government Exhibit No. 13.

XVIII.

In admitting in evidence Government Exhibits No. 14 and 15.

XIX.

In admitting in evidence Government Exhibits No. 17, 18, 19 and 20.

XX.

In admitting in evidence Government Exhibits No. 21 and 22.

XXI.

In admitting in evidence Government Exhibit No. 24.

XXII.

In admitting in evidence Government Exhibit No. 25.

XXIII.

In admitting in evidence Government Exhibit No. 26.

XXIV.

In admitting in evidence Government Exhibit No. 27.

XXV.

In admitting in evidence Government Exhibit No. 28.

XXVI.

In admitting in evidence Government Exhibit No. 29.

XXVII.

In admitting in evidence Government Exhibit No. 33. [34]

XXVIII.

In admitting in evidence Government Exhibit No. 35.

XXIX.

In admitting in evidence Government Exhibit No. 42.

XXX.

The District Court erred in permitting the witness, William M. Whitney to testify as follows over the defendant's objection that the same was immaterial and not a subject for expert testimony:

Q. Mr. Witney, in your experience as a Prohibition Director, I will ask you what the abbreviations are for intoxicating liquor for gin?

Mr. VANDERVEER.—I object as immaterial and not a subject for expert testimony.

The COURT.—He may answer.

A. "G."

Mr. VANDERVEER.—It is not proven that these are any established abbreviations.

The COURT.—I understand; he just asked what they are.

Q. What is the abbreviation for Scotch?

A. "S."

Mr. VANDERVEER.—The same objection to run to each of these.

The COURT.—Yes.

Q. What is the abbreviation for Bourbon?

A. "B."

Q. What is the abbreviation for Three Star Hennessy? A. "Three Stars."

Q. What is the abbreviation for Old Parr?

A. "OP."

Q. What is the abbreviation for Haig's Dimple?

A. "HD," sometimes "P."

Q. What is the abbreviation for Hill & Hill? [35]

A. Well, it is usually "H&H," sometimes "LL."

Mr. VANDERVEER.—Objection shown to each question. It is not a subject for expert testimony, and it is wholly immaterial.

The COURT.—Yes; overruled.

Mr. VANDERVEER.—Exceptions.

Q. What is the abbreviation for Johny Walker's Red Label? A. "JWRL."

XXXI.

The District Court erred in denying the defendant's motion for a reconsideration of their motion for a new trial filed herein on March 29th, 1924.

XXXII.

The District Court erred in denying and not granting the motion for a rehearing filed on April 22d, 1924.

*XXXIV.*

The District Court erred in signing and filing the order denying the motion for reconsideration of defendants' motion for new trial and motion for rehearing.

WHEREFORE, the said Ed J. Hagen, plaintiff in error, prays that the judgment of said Court be reversed and this cause be remanded to said Circuit Court with instructions to dismiss same and discharge the plaintiff in error from custody and exonerate the sureties on his bail bond, and for such other and further relief as to the Court may seem proper.

FRED C. BROWN,
Attorney for Ed. J. Hagen.

Due service admitted this 25th day of April, 1924.

THOS. P. REVELLE,
District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

United States District Court, Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED W. PIELOW, CHARLES GIVENS and ED J. HAGEN,

Defendants.

## BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on the 28th day of February, 1924, this cause came on for trial before the Honorable Jeremiah Neterer, District Judge, the plaintiff appearing by Thos. P. Revelle and C. T. McKinney, United States Attorney and Assistant United States Attorney, respectively, the defendants appearing by G. F. Vanderveer, their attorney, and thereupon the following proceedings were had:

When said cause was called for trial and before any other proceedings were had therein, the defendants Ed. W. Pielow and Charles Givens presented to the Court orally their several petitions for the return to them of the property seized by federal prohibition agents in their possession and in their residence at No. 122 Broadway, Seattle, Washington, on the 20th day of February, 1923, on the grounds specified in the formal petition therefor filed by the defendant, Ed W. Pielow, and veri-

(Testimony of Gordon B. O'Harra.)

fied by his attorney on the 1st day of May, 1923, and after full consideration thereof said petitions were both denied and both petitioners allowed an exception.

## TESTIMONY OF GORDON B. O'HARRA, FOR PLAINTIFF.

Thereupon GORDON B. O'HARRA was called as a witness by the plaintiff and after being duly sworn testified that he was a Federal Prohibition Agent; that on the night of February 20, 1923, about nine o'clock P. M., two or three hours after dark, armed with a search-warrant, of which a copy is attached to the petition of Ed W. Pielow for the return of property filed therein, and accompanied [37] by William M. Whitney and other Federal Prohibition Agents, he entered the premises at No. 122 Broadway, which is an ordinary dwelling-house; that the defendant Pielow came and opened the door when Regan rang the door bell, and let them in; that he proceeded to the room with the search-warrant in his hand and served the search-warrant on defendant Hagen at that time in the center of the dining-room; that they then proceeded to search the premises for liquor acting upon the authority of said warrant; that they found some beer and gin in the kitchen. At this point Mr. Vanderveer objected to any testimony regarding the discovery of liquor under this search-warrant, or any article whatsoever, on the ground the search-

(Testimony of Gordon B. O'Harra.)

warrant was wholly void. The Court let this objection stand to all the liquors found there.

Mr. VANDERVEER.—Or papers.

The COURT.—As to any papers or documents, I would like to have you enter the objection when the question arises. Objection overruled. Exception noted.

Witness, continuing his testimony, further stated that in a dresser drawer in an upstairs room occupied by the defendant Ed W. Pielow he found a printed export price list of the Consolidated Exporters Corporation, Ltd., Vancouver, B. C., which was thereupon marked for identification, "Government Exhibit 19," and on top of the dresser in the same room a pint whisky flask partly filled with whisky which was marked for identification, "Government's Exhibit 25"; also a business card of the Navy Dye Works bearing the notation, "Night Phone E11. 4583–W," which was marked for identification, "Government's Exhibit 42"; and that a similar card bearing the notation, "Ask for Charley," and marked for identification, "Government's Exhibit 43," was taken at the same time from the person of defendant Ed J. Hagen. That in another room on the [38] second floor, occupied by Anna May Givens, he found in a dresser drawer a great many sales slips which were marked for identification, "Government's Exhibits 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 33 and 35"; that in a suitcase in a closet in the same room, and also in the dresser drawer, he found a great many money wrappers, which were

(Testimony of Gordon B. O'Harra.)

marked for identification, "Government's Exhibit 5," and under a cushion on a chair in this same room he found a ledger which was marked for identification, "Government's Exhibit 2," and a day-book which was marked for identification, "Government's Exhibit 3." Witness further testified that the rooms up there were numbered and that defendant Pielow roomed in room No. 2; that defendant Pielow stated that that was his room, that he had rented it and admitted the ownership of the things found in it; that he overheard a conversation in which defendant, Chris Brown, stated he had rented those premises there—it was his place.

Witness further testified that on the ground floor he found three bottles of gin which were marked for identification, "Government's Exhibits 22, 24 and 26, respectively, which were at the time contained in a gunny sack marked for identification, "Government's Exhibit 29"; that in the kitchen and ice-box a number of bottles of Canadian beer and home brewed beer, specimens of which were marked for identification, "Government's Exhibits 27 and 28," respectively. Also, that there were hundreds of whisky bottles in the basement in this place and a large number of grass cartons used to protect the bottles from breaking in transit; that there were several empty bottles upstairs, bottles of different kinds and nearly all of them bearing labels indicating they had been recently used to hold liquor.

On cross-examination the witness testified that Mr. Hagen stated he did not live at No. 122 Broad-

(Testimony of Gordon B. O'Harra.)

way, which statement was true so far as the witness knew; that the defendant Brown and [39] his wife had rooms on the first floor and the defendants Givens and Pielow and the witness Anna Givens had rooms on the second floor, and they were so far as the witness knew, the only occupants of the house, that defendant Givens assumed responsibility for the ownership of all the liquor.

Upon being shown Government's Exhibit 21, witness testified that they were taken off the defendant Hagen by Mr. Regan in the witness' presence.

## TESTIMONY OF C. O. MYERS, FOR PLAINTIFF.

Whereupon C. O. MYERS was called as a witness for the plaintiff and testified that according to the records the telephone number on the block was Elliott 4583–W for a number of years, at least as far back as 1916, and that they had a telephone in this place after January 4, 1923; that on that date the telephone number was changed to Elliott 5911; that number Elliott 4583–W was a four-party line, but that he did not know how many were on it; that number Elliott 5911 is an individual line; and that so far as he knew the same party occupied those premises that had it changed, that there was no request made to change the name.

## TESTIMONY OF S. C. LINVILLE, FOR PLAINTIFF.

Whereupon S. C. LINVILLE was called as a witness for the plaintiff and testified that he, in

(Testimony of S. C. Linville.)

company with Mr. Sheehan, Mr. Morris and Mr. Whitney, entered the premises through the kitchen door; that he was with Sheehan all the time when he was down in the basement at 122 Broadway; that, afterwards, in the dining or living-room, just off the kitchen, there was some conversation as to the ownership of the various liquors which had been found; that Mr. Givens came out in the kitchen to get a drink; that his mother was in the other room, just in the doorway, and stated she didn't know anything about the gin; and that he distinctly heard Mr. Givens say, "Don't worry about the gin; the gin belongs to me, I put it there."

## TESTIMONY OF ANNA MAY GIVENS, FOR PLAINTIFF.

ANNA MAY GIVENS was called as a witness by the [40] plaintiff, testified that she lived at 122 Broadway on the 20th of February, 1923; that she made the entries in the ledger from the sales slips, that were introduced in evidence which were handed to her by Mr. Pielow; that she was living there with her mother and father and paid no room and board; that the books and ledgers were kept in her room and had been in her room and in her possession; that the entries were made in her handwriting; and that Mr. Pielow had access to them. Upon having her attention directed to Government's Exhibit 33, Miss Givens testified that she made the entries from these slips to the books. Witness identified Exhibit 5, also Government Exhibits 15, 16,

(Testimony of Anna May Givens.)

34 and 37. She further testified that she had a brother by the name of Charlie who was living at 122 Broadway at that time; that he occupied a room in their private home; and that he paid room and board.

## TESTIMONY OF WILLIAM M. WHITNEY, FOR PLAINTIFF.

Whereupon WILLIAM M. WHITNEY was called as a witness for the plaintiff, and after being duly sworn testified that he was Assistant Prohibition Director for the State of Washington, that on the night of February 20, 1923, he had taken part in the search of the premises at No. 122 Broadway, Seattle, Washington. Witness also testified that he saw Mr. Hagen come to the window and toss a bottle out before the witness entered the building.

Q. I wish you would step down here to this map, Mr. Whitney, and show the jury just where you were standing, and under what circumstances that liquor was thrown from the window, and by whom.

A. Well, we stood here, and here is the house where Mr. Sheehan lived. We first went in there and came out the rear way and went to the rear of 122 Broadway. I stepped back rather towards, or almost to the garage, when the others were at the front, anticipating such things might happen. Mr. Hagen came to the window and just gave a toss, and a bottle hurtled through the air, and I yelled to Mr. Sheehan to go and get it; and Mr. [41] Linville and I went right into the house at a door on the south side of the kitchen.

(Testimony of William M. Whitney.)

Well, then, Mr. O'Harra and I went upstairs. First of all I looked over the articles that were taken from the person of Hagen, and the book taken from Pielow; then Mr. O'Harra and I went upstairs also, and we searched Mr. Pielow's room and Miss Givens' room which was room No. 1. Pielow's room was No. 2, also Mr. Charles Given's room, which was room No. 3. Mr. O'Harra and I found the ledger and a small book between the cushions of a wicker chair in Miss Givens' room, No. 1. Mr. O'Harra first found the slips in the top—as I recall, the top dresser drawer; I saw him find them, and take them out, and he and I looked over some of them together. Upon being shown Government's Exhibit 2, marked for identification, witness testified that it was the ledger that was found up there; that his experience as a federal prohibition agent had acquainted him with the various abbreviations and different signs that represented the different brands of intoxicating liquors. Upon being shown Government's Exhibit 14, marked for identification, and asked where he got them, witness testified it was his belief out of Miss Givens' room, in the top drawer. Upon having his attention directed to Government's Exhibits 14 and 11, witness testified that these were a portion of the sales slips that were in Miss Givens' room, that they were pinned together at that time by dates. Upon having his attention directed to Government's Exhibits 35 and 34, and being asked where he got them, witness testified that he got them out of Anna Givens' room.

(Testimony of William M. Whitney.)

Witness further testified that every one of the slips and items in Government's Exhibit 9 were taken from the top drawer of Anna Givens' room; and beneath the slip of February 10th was a bill that was folded up and pinned in the bunch on that date; that on Government's Exhibit 10, the top paper, one under date of February [42] 20th, 1923, was found in the drawer with the rest of them, likewise all other slips were found in the same place.

Upon being shown Government's Exhibit No. 21, marked for identification, witness testified that these were cards that were taken from the person of Ed Hagen by Mr. Regan in his (witness') presence.

Upon being shown Government's Exhibit 42, marked for identification, witness testified that this one came from Pielow's room, and one came from his person (Pielow's).

Witness identified Government's Exhibit 4, marked for identification, and testified that these were slips that were taken from Anna Givens' room, in the top drawer.

Witness identified Government's Exhibit 7, and testified that they were some of the same papers from Anna Givens' room, having been pinned together by dates, and that one had been removed from the dates there which they were bought.

Witness identified Government's Exhibit 8, and testified that they were all taken from the room of Anna Givens; that they had been removed from the dates to which they were attached to the ones of the same date.

(Testimony of William M. Whitney.)

Witness identified Government's Exhibit 33, marked for identification, and testified that these came from the same place.

Witness identified Government's Exhibit 5, marked for identification, and testified that these were in a suitcase; that there were several packages of this kind of slips, some in a bureau drawer and some in a suitcase in a little alcove room of Anna Givens'.

Witness identified Government's Exhibit 18, marked for identification, and testified that these were papers taken from the person of Ed Hagen by Mr. Regan and himself. [43]

Witness identified Government's Exhibit 15, marked for identification, and testified that it was one of the little books taken from the person of Ed Hagen by Mr. Regan in witness' presence.

Witness identified Government's Exhibit 6, marked for identification, and testified that he got them from Mr. Pielow's room.

Witness identified Government's Exhibit 16, marked for identification, and testified that he had seen that before in Miss Givens' room.

Witness identified Government's Exhibit 17, marked for identification, and testified that they were three slips of paper taken out of one of the books from the person of Ed Hagen by Mr. Regan in witness' presence.

Witness identified Government's Exhibit 20, marked for identification, and testified that this deposit slip came from the person of Ed Hagen;

(Testimony of William M. Whitney.)

came out of the book taken from Mr. Hagen by Mr. Regan in witness' presence.

Witness identified Government's Exhibit 44, marked for identification, and testified that it was found by Mr. O'Harra and himself in Mr. Pielow's room, room No. 2.

Witness further testified that he answered the telephone while on the premises. Mr. Vanderveer objected to that as hearsay, entirely improper and immaterial, and the Court sustained the objection.

Witness further testified that during the raid a statement was made by Mr. Pielow, stating that Mr. Pielow lived in room 2, paid board and room rent to Mr. and Mrs. Brown, and that the room was his; and that the bottle of whisky found in his room by Mr. O'Harra in witness' presence, on the dresser was his. Also stated that he had a boat called the "Ruby."

Witness identified Government's Exhibit 30, marked for identification, and testified that it was one of the books taken from the [44] person of Ed Hagen by Mr. Regan in witness' presence.

Witness identified Government's Exhibit 31, marked for identification, and testified that it was another book taken from Ed Hagen by Mr. Regan in witness' presence.

Witness identified Government's Exhibit 19, marked for identification, and testified that it was found in Mr. Pielow's room by Mr. O'Harra in witness' presence.

Witness identified Government's Exhibit 32, marked for identification, and testified that Mr.

(Testimony of William M. Whitney.)

Regan took that book from the person of Ed Pielow in witness' presence; that both of the books marked as Exhibit 32, came off the person of Ed Pielow.

Witness identified Government's Exhibits 22, 26 and 24, and testified that they were the three bottles of gin that were in the sack he put the labels on.

Witness further testified that he, with Mr. O'Harra, searched the garage; that there was a pit dug and boarded up under one garage, and had a false bottom, and in the bottom part were some sacks with quite a number of grass cartons that come around whisky bottles.

## TESTIMONY OF MRS. H. M. O'NEILL, FOR PLAINTIFF.

Whereupon Mrs. H. M. O'NEILL was called as a witness for the plaintiff, and being duly sworn, testified that she was a notary public in the city of Seattle on the 20th day of March, 1923; that she was employed at that time by C. L. Morris; that she acted as notary public and that she took Mr. Hagen's acknowledgment that he signed Government's Exhibit 45, but that she did not know whether he signed it in her presence or not.

Q. (By the COURT.) Did any of the parties acknowledge to you that that was their signature, in your presence?

A. Certainly, I took their acknowledgment.

Witness further testified that she took the acknowledgment of Charley Givens that he signed

(Testimony of Mrs. H. M. O'Neill.)

Government's Exhibit 37, and that he must have been present at the time. [45]

Q. As to Government's Exhibit 39, for identification, I will ask you if you took the acknowledgment for that bond?

A. I guess I did. I don't see my signature anywhere on it.

## TESTIMONY OF A. C. BOWMAN, FOR PLAINTIFF.

Whereupon A. C. BOWMAN was called as a witness for the plaintiff, and being duly sworn, testified as follows: that he was United States Commissioner for this district; that he was acting as such on March 9th, 1923; that Ed Hagen acknowledged his signature on Government's Exhibit 46 on the 21st day of February, 1923, instead of on the 9th of March; that Mr. Hagen was present at the time; and that he could identify the defendant as the man that acknowledged signing the said Exhibit 46. That Mr. Pielow also on the 21st day of February, 1923, acknowledged Government's Exhibit 47 before him, and that he recognized the defendant Pielow as being the man that acknowledged that.

Q. Showing you Government's Exhibit 48, marked for identification, I will ask you if Mr. Givens acknowledged that before you on whatever date is on there?

Mr. VANDERVEER.—I object as immaterial.

The COURT.—Overruled.

(Testimony of A. C. Bowman.)

Mr. VANDERVEER.—Exception.

A. Mr. Givens acknowledged this before me. Charles Givens.

Mr. VANDERVEER.—I thought you said Miss Givens.

Witness testified that he did not believe he would recognize Mr. Givens as the man before him that acknowledged that.

Witness testified that Mr. Brown acknowledged Government's Exhibit 49 before him on the 21st day of February, 1923.

Mr. McKINNEY.—I offer the bonds in evidence at this time, your Honor.

Mr. VANDERVEER.—Make the same objection as to each one, and it was executed in exercise of a constitutional right, and no advantage can be taken of it. [46]

The COURT.—Overruled. Admitted.

Mr. VANDERVEER.—Exception.

At this point the plaintiff offered in evidence Government's Exhibits 23, 25, 27, 28, 22, 24 and 26.

Mr. VANDERVEER.—I make the same objection which I have heretofore urged, that these articles were seized from the defendants unlawfully, and without any warrant in law, and are the same articles which we have heretofore petitioned for the return and suppression.

The COURT.—Overruled.

Mr. VANDERVEER.—Exception.

The COURT.—Note an exception.

(Exhibits 23, 25, 27, 28, 22, 24 and 26, admitted in evidence.)

Mr. McKINNEY.—Also offer in evidence Government's Exhibits 2 and 3, being ledgers which were seized in Miss Givens' room on the night of the raid.

Mr. VANDERVEER.—Same objection. With, of course, the further objection that these books were not taken from the possession of anybody against whom a search-warrant had been issued, nor are they described in any way on earth in either the affidavit or warrant. The warrant is absolutely void.

The COURT.—Objection overruled.

Mr. VANDERVEER.—Exception.

(Admitted.)

Government's Exhibits 29, 30, 31, 14, 10, 9 and 11, admitted as evidence. Usual objection raised by Mr. Vanderveer, overruled by the Court and exception taken by Mr. Vanderveer.

Mr. McKINNEY.—Also Government's Exhibit 16, a mortgage with Anna Givens' signature on it.

Mr. VANDERVEER.—Further objection that it is immaterial and irrelevant.

Mr. McKINNEY.—For the purpose of showing her handwriting in comparison with the sales slips. [47]

The COURT.—The signature may be admitted for the purpose of signature.

Mr. VANDERVEER.—It is not at all necessary for that purpose, we have books full of her admitted handwriting; it is prejudicial and it is not at all necesssary or germain on anything in this case.

The book full of handwriting she had admitted, and your Honor had already admitted in evidence.

The COURT.—I think that is right. That will be denied.

Government's Exhibits 16, 21, 35 and 8, admitted as evidence. Usual objection raised by Mr. Vanderveer, overruled by the Court and exception taken by Mr. Vanderveer.

The COURT.—Enumerate them all and let one objection cover them all.

Mr. McKINNEY.—18, 17 and 5 being—

Mr. VANDERVEER.—Further objection it is immaterial as to 5.

The COURT.—That will be overruled.

Mr. VANDERVEER.—Exception. That has no materiality in this case at all.

(Admitted.)

Government's Exhibits 42 and 43 admitted as evidence.

Mr. McKINNEY.—Government's Exhibits 7 and 19.

Mr. VANDERVEER.—Upon what pretext is 19 offered? Not material at all.

Mr. McKINNEY.—You look at it, your Honor, different items; also price lists on intoxicating liquor in Canada. The first document I offer for the purpose of showing Pielow's handwriting; his signature is upon that note; and also this document here.

Mr. VANDERVEER.—Of course, the objection goes to this also. They were illegally seized; it is a

little bit difficult to say that any of those—at least an insurance policy—is an instrument of crime.

Mr. McKINNEY.—No, we don't care about the insurance policy. [48]

The COURT.—Objection to the policy will be sustained. The note may go in for the purpose of showing signature, and this other memorandum, there—

Mr. VANDERVEER.—The signature on the note is not proven; not a word about it.

The COURT.—That is right. The objection will be sustained.

Mr. McKINNEY.—Exhibit No. 20, marked for identification, being a deposit slip taken from the person of Hagen.

Mr. VANDERVEER.—Object to that as immaterial; also seized illegally; cannot be pretended to be an instrument for the commission of any crime; private document.

The COURT.—Overruled.

Mr. VANDERVEER.—Exception.

(Admitted.)

Mr. McKINNEY.—I make an offer of all these exhibits to include exhibits 1 to 49.

The COURT.—I guess you have enumerated all?

Mr. McKINNEY.—No, I haven't.

The CLERK.—16 is not offered.

The COURT.—That may be returned. I understand the general objection is made to all these, and overruled, and exception noted.

## TESTIMONY OF J. P. WILSON, FOR PLAINTIFF.

J. P. WILSON, called as a witness for the plaintiff, being duly sworn, testified that he is the president of the Wilson Modern Business College; that he had had occasion to compare and form judgments as to the similarity of handwritings for about forty years; upon being shown Government's Exhibit 46 and asked to compare it with the handwriting on Government's Exhibit 40, and also being shown Government's Exhibit 45 and the signature thereon and also a part of Government's Exhibit 13, and asked if he would say that the same man wrote the two signatures, that they were in the same handwriting, witness testified that [49] he should think the name "Hagen" on the slip and the name "Hagen" on the two papers were written by the same person.

## TESTIMONY OF J. S. SWENSON, FOR PLAINTIFF.

J. S. SWENSON, being called as a witness for the plaintiff, was duly sworn and testified that he was a Postoffice Inspector for the United States Government and that in that capacity he had occasion to examine handwritings to a considerable extent; that he had been engaged in that kind of work about twenty years. Upon being shown Government's Exhibit 45 and Government's Exhibit 13 and asked to compare the two signatures witness testified

(Testimony of J. S. Swenson.)

that he believed that the first signature, "Ed Hagen" as in the one document and the "Hagen" written in the other and all the handwriting on the slip were written by the same person. Upon being shown Government's Exhibit 10 and Government's Exhibit 45 and asked to compare the two signatures and give his opinion as to whether the two signatures were the same, witness testified that he thought they were written by the same person.

## TESTIMONY OF WILLIAM M. WHITNEY, FOR PLAINTIFF (RECALLED).

Recalled as a witness for the plaintiff, Mr. WHITNEY testified as follows:

Q. Mr. Whitney, in your experience as a Prohibition Director I will ask you what the abbreviations are for intoxicating liquor for gin?

Mr. VANDERVEER.—I object as immaterial; not a subject for expert testimony.

The COURT.—He may answer.

A. "G."

Mr. VANDERVEER.—It is not proven that these are any established abbreviations.

The COURT.—I understand; he just asked him what they are.

Q. What is the abbreviation for Scotch?

A. "S."

Mr. VANDERVEER.—Same objection to run to each of these. [50]

The COURT.—Yes.

Q. What is the abbreviation for Bourbon?

(Testimony of William M. Whitney.)

A. "B."

Q. What is the abbreviation for Three Star Hennessy? A. "Three Stars."

Q. What is the abbreviation for Old Parr?

A. "O. P."

Q. What is the abbreviation for Haig's Dimple?

A. "H. D." sometimes "P."

Q. What is the abbreviation for Hill & Hill?

A. Well, it is usually "H. & H." sometimes "LL."

Mr. VANDERVEER.—Objection shown to each question. It is not subject for expert testimony, and it is wholly immaterial.

The COURT.—Yes, overruled.

Mr. VANDERVEER.—Exception.

Q. What is the abbreviation for Johnny Walker's Red Label? A. "J. W. R. L."

When cross-examined by Mr. Vanderveer, the witness testified that the abbreviations referred to had just grown up in the trade; that they were used by those engaged in the liquor traffic; that all used nearly the same ones; and that he did not know what ones the witness Anna Givens used.

## TESTIMONY OF ANNA GIVENS, FOR PLAINTIFF.

Thereupon ANNA GIVENS was called as a witness by the plaintiff and after being duly sworn testified that all of the slips identified as Government Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 33, and

(Testimony of Anna Givens.)

35 were given to her by the defendant Ed W. Pielow; that she did not know in whose handwriting they were nor understand the abbreviations appearing thereon, but entered the same in the day-book and ledger identified as Government Exhibits 3 and 2 respectively and that all of said books and slips belonged to the defendant Pielow and were in her room at the time of their seizure [51] only for her own convenience in posting the same.

When the jury retired to deliberate on its verdict all of the exhibits were sent to the jury-room and by inadvertence Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, and 21 were each enclosed in an envelope which also went to the jury-room bearing in its upper left-hand corner the printed return address: "Office of United States Attorney, Seattle, Wash." and certain other inscriptions in writing as follows:

Upon Government's Exhibit 6, the inscription: "Slips showing purchases."

Upon Government's Exhibit 7, the inscription: "Expenses."

Upon Government's Exhibit 8, the inscription: "Withdrawals by Hagen."

Upon Government's Exhibit 9, the inscription: "Slips showing withdrawals by Charley."

Upon Government's Exhibit 10, the inscription: "20th slip on day of arrest—Sales slip."

Upon Government's Exhibit 11, the inscription: "Rainier Club Sales Slip."

Upon Government's Exhibit 12, the inscription: "Slips showing expense—see slip as to charity."

Upon Government's Exhibit 13, the inscription: "Slips showing def. handwriting and Anna's handwriting."

Upon Government's Exhibit 14, the inscription in red lead pencil: "Payments on the 31st—withdrawals Feb. 10th," and in black lead pencil the additional inscriptions: "Slips showing withdrawal of money by Hagen & Pielow—see last page of big ledger."

Upon Government's Exhibit 15, the inscription: "138.00 taken for load Hagens person."

Upon Government's Exhibit 18, the inscription: "Deposit slip to credit Con—Exp. Canada—Hagen had on person. Bill came from Pielow's room 'Fred Moore' Bill." [52]

Upon Government's Exhibit 21, the inscription:

"E11 4583 W)
E11 5911 ) Same No."

Card with Secret No. on it presented by Ed Hagen—Hagen's person.

And Government's Exhibit 17 was sent to the jury-room enclosed in an envelope which also went to the jury-room bearing in its upper left-hand corner the printed return address: "Treasury Department, Office of Federal Prohibition Director, Tacoma, Wash." which also bore the following inscription: "U. S. vs. Ed Hagen from his person to be photographed."

After the defendant's motion for a new trial had been denied, judgment entered, and writs of error herein had been issued as to the defendants Ed W.

Pielow and Charles Givens, the defendants severally moved the Court for a reconsideration of the motion for a new trial and for an order vacating the verdict and granting a new trial on the ground of unavoidable casualty and misconduct preventing them from having a fair trial, and filed in support of said motion the following affidavit of their attorney which was uncontradicted:

"G. F. Vanderveer, being first duly sworn, says that he is the attorney for the defendants in the above-entitled cause; that on the trial of said cause a great many cards, sales slips, memoranda and other documents were identified by various witnesses as papers taken from the possession of either the defendant Ed J. Hagen or Ed W. Pielow or from the room of one Anna Givens; that among other exhibits so identified were the following, to wit;

Government's Exhibit 6, consisting of a bundle of slips from the room of Anna Givens.

Government's Exhibit 7, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 8, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 10, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 13, consisting of a bundle of slips taken from the room of Anna Givens. [53]

Government's Exhibit 14, consisting of a bundle of slips taken from the room of Anna Givens.

Government's Exhibit 11, consisting of papers taken from the person of the defendant Hagen.

Government's Exhibit 12, consisting of papers taken from the person of the defendant Hagen.

Government's Exhibit 15, consisting of a memorandum book and other papers taken from the possession of the defendant Hagen.

Government's Exhibit 18, consisting of papers taken from the possession of the defendant Hagen.

Government's Exhibit 20, consisting of other papers which on account of the present scrambled condition of the exhibits deponent is not now able to specifically identify.

Government's Exhibit 21, consisting of cards taken from the possession of the defendant Hagen.

That deponent carefully examined all of said papers and documents as they were identified by the several witnesses and none of them were then enclosed in any envelopes or other containers, nor were any envelopes or other containers identified by the witnesses as a part of the exhibits.

Deponent estimates that more than two hundred separate articles, papers and documents of various kinds were thus identified and admitted in evidence, and alleges at all times between the date of their seizure by Government officials on February 20, 1923, and the trial of said cause all of said exhibits were in the secret custody of Government officials, and on account thereof deponent neither had nor sought an opportunity to examine them or study their contents; that because of their great volume deponent made no attempt to study said exhibits during the progress of the trial nor did he examine or comment on any of them in the course of his

argument to the jury, and for all of said reasons deponent had no occasion to, nor did he, ever inspect said exhibits after their identification by the various witnesses until the 27th day of March, 1924, when in the course of preparing the defendant's proposed bill of exceptions herein he secured the same from F. M. Harshberger, the Clerk of the above-entitled Court, for the purpose of preparing a descriptive list to supplement the transcript of testimony theretofore furnished him by the court reporter; and upon examination, discovered for the first time, to his great surprise, that all of the exhibits hereinabove referred to, except in so far as they had become disarranged, were contained in envelopes bearing in their upper left-hand corner the printed return address: "Office of United States Attorney, Seattle, Wash." and certain other inscriptions in writing as follows:

Upon Government's Exhibit 6, the inscription: "Slips showing purchases."

Upon Government's Exhibit 7, the inscription: "Expenses."

Upon Government's Exhibit 8, the inscription: "Withdrawals by Hagen." [54]

Upon Government's Exhibit 9, the inscription: "Slips showing withdrawals by Charley."

Upon Government's Exhibit 10, the inscription: "20th slip on day of arrest—Sales slip."

Upon Government's Exhibit 11, the inscription: "Rainier Club sales slip."

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Upon Government's Exhibit 18, the inscription: "Deposit slip to credit it Con—Exp. Canada—Hagen had on person. Bill came from Pielow's room 'Fred Moor' Bill."

And upon Government's Exhibit 21, the inscription:

"E11 4583 W)
E11 5911 ) Same No.

Cards with secret No. on it presented by Ed Hagen—Hagen's person."

And Government's Exhibit 17 was sent to the jury-room enclosed in an envelope which also went to the jury-room bearing in its upper left-hand corner the printed return address: "Treasury Department, Office of Federal Prohibition Director, Tacoma, Wash." which also bore the following inscription: U. S. vs. Ed Hagen, from his person to be photographed."

That deponent immediately inquired of said F. M. Harshberger whether said envelopes had been submitted to the jury with their contents and was in-

formed that they had; and deponent alleges on such information that all of said envelopes were taken by the jury to their jury-room and considered in their deliberations upon the verdict. That thereafter deponent exhibited the envelopes containing Government's Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, and 21 to Mr. C. T. McKinney, the Assistant United States Attorney who tried said case in behalf of the Government and inquired if he knew the handwriting thereon, whereupon said Mr. C. T. McKinney informed him that it was his own handwriting; and deponent then exhibited to Mr. Gordon B. O'Harra, a Federal Prohibition Agent, the envelope containing Government's Exhibit 17 with a similar inquiry and was informed by him that in his opinion the writing thereon was in the handwriting of William M. Whitney, Assistant Prohibition Director of the State of Washington.

That immediately thereafter, deponent presented said matter to the above-entitled Court substantially in the manner recited in this affidavit with the request that all of said documents be [55] compounded, which said Court thereupon ordered done.

Deponent makes this affidavit in support of the defendants' motion for a new trial."

Plaintiff in error prays that this his bill of exceptions may be allowed, settled and signed.

Inserted by the Court: The several slips and memoranda had been enclosed in the envelopes with the writing thereon. These envelopes, with the slips enclosed, were presented to the witnesses for identification and the envelopes containing the slips

were marked by the Clerk. During the trial these exhibits were kept in the several envelopes and were used as occasion required while so enclosed, and in this manner were sent to the jury-room. The contents of the envelopes as impounded, are not all as when sent to the jury.

FRED C. BROWN,
Counsel for Plaintiff in Error, Ed J. Hagen.

Settled and allowed this 8th day of September, 1924.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1924. F. M. Harshberger, Clerk. [56]

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In the District Court of the United States, Western District of Washington, Northern Division.

No. 7469.

ED J. HAGEN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REQUISITION FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare to be included in the

transcript of record of the above-entitled cause the following:

1. Indictment.
2. Motion to quash indictment.
3. Order denying same and noting exceptions.
4. Petition of Ed W. Pielow for return of property.
5. Order denying same and noting exception.
6. Verdict.
7. Judgment.
8. Motion for new trial.
9. Order denying same and noting exception.
10. Motion for reconsideration of motion for new trial.
11. Order denying same and noting exception.
12. Petition of Ed J. Hagen for writ of error.
13. Order allowing writ of error.
14. Writ of error of Ed J. Hagen.
15. Citation on writ of error of Ed J. Hagen.
16. Assignments of error of Ed J. Hagen.
17. Bill of exceptions.
18. This praecipe.

FRED C. BROWN,
Attorney for Plaintiff in Error, Ed J. Hagen.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 18, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [57]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN,

Defendant.

## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 57 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [58]

| | |
|---|---|
| Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return 152 folios at 15¢ | $22.80 |
| Certificate of Clerk to transcript of record, 4 folios at 15¢ | 60 |
| Seal to said Certificate | 20 |
| Total | $23.60 |

I hereby certify that the above cost for preparing and certifying record, amounting to $23.60, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 16th day of September, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [59]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

WRIT OF ERROR (ED J. HAGEN).

The President of the United States to the Honorable JEREMIAH NETERER, Judge of the District Court of the Western District of Washington, Northern Division, and to the said Court, GREETINGS:

Because in the record and proceedings as also in the rendition of the judgment and sentence in the District Court of the United States for the Western District of Washington, Northern Division, in a cause pending therein wherein the United States of America was plaintiff and Ed J. Hagen, defendant, it is charged a manifest error happened and occurred to the damage of the said Ed J. Hagen, the above-named plaintiff in error as by his petition and complaint doth appear, and we being willing that error, if any there hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you that under your seal you send the record and pro-

ceedings aforesaid with all things concerning the same and pertaining thereto to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ so that you may have same at San Francisco where said Court is sitting within thirty (30) days from the date hereof in the said Circuit Court of Appeals to be then and there held and the records and proceedings aforesaid being inspected the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and custom of the United States should be done. [60]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 25th day of April, 1924.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court of the Western District of Washington.

Allowed this 25th day of April, 1924.

JEREMIAH NETERER,
District Judge.

Received a copy of the foregoing writ of error this 25th day of April, 1924.

J. W. HOAR,
Spec. Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [61]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED J. HAGEN, ED W. PIELOW, CHARLES GIVENS and CHRIS BROWN,

Defendants.

CITATION ON WRIT OF ERROR (ED J. HAGEN).

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within (30) thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office in the District Court of the United States for the Western District of Washington, Northern Division, wherein Ed J. Hagen is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against Ed J. Hagen as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable JEREMIAH NETERER, Judge of the District Court of the United States

for the Western District of Washington, this 25 day of April, 1924.

[Seal] JEREMIAH NETERER,
District Judge.

Due service of a copy of the foregoing Citation admitted this 25 day of April, 1924.

J. W. HOAR,
Spec. Asst. U. S. District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 25, 1924. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [62]

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[Endorsed]: No. 4351. United States Circuit Court of Appeals for the Ninth Circuit. Edward Joseph Hagen, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed Sept. 29, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the

# United States Circuit Court of Appeals

## For the Ninth Circuit

No. 4351

EDWARD JOSEPH HAGEN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

## Brief of Plaintiff in Error

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In the

# United States Circuit Court of Appeals

## For the Ninth Circuit

No. 4351

EDWARD JOSEPH HAGEN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

## Brief of Plaintiff in Error

### STATEMENT OF THE CASE.

The plaintiff in error, Edward Joseph Hagen, together with Edward Wheeler Pielow, Charles Andrew Givens and Chris Brown, were jointly indicted in one count for conspiracy to violate the National Prohibition Act by possessing, transporting and selling intoxicating liquor. The indictment

contains five overt acts. First: That the defendants jointly maintained a dwelling house at 620 Broadway Avenue, in Seattle, Washington; second, the sale by plaintiff in error of twelve bottles of gin; third, the transportation of certain liquor by defendant Givens; fourth, the making and entering in writing "accounts showing the daily receipts and expenditures of money by the said conspirators;" and fifth, the unlawful possession of intoxicating liquors by all the defendants.

Plaintiff in error, together with defendants Pielow and Givens, were found guilty. Plaintiff in error was sentenced to imprisonment for the term of two years. (Trans. p. 26.)

Whereupon application was made for writ of error to review the judgment of the District Court, which having been granted, the case was brought to this court.

The indictment was filed March 8, 1923. (Trans. p. 5.) On March 14, 1923, the defendants moved to quash the indictment on the ground that the Grand Jury which returned the indictment based the same on evidence seized in violation of the constitutional rights of defendants. (Trans. p. 7.) On May 1, 1923, Defendant Ed. W. Pielow

petitioned for the return of the property illegally seized. (Trans. p. 15.) This petition was based on the grounds that the search warrant was void and was issued in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and of Title XI of the Act of Congress of June 15, 1917, and of the National Prohibition Act.

Both the motion to quash the indictment and to suppress, after argument, were by the Trial Judge denied and exception allowed. (Trans. pp. 13 and 24.)

The case came on for trial before the Honorable Jeremiah Neterer on February 28, 1924. The defendants again orally petitioned for the return of the property to them. The defendants, including plaintiff in error, adopted the grounds set out in the formal written petition previously filed by the defendant, Ed. W. Pielow. This application was denied and exception allowed. (Trans. p. 49.)

The evidence of the Government at the trial consisted almost entirely of books, papers and liquor seized by the agents of the Government, when they entered the premises of the defendants under the search warrant. All this evidence was admitted

over the objections of the defendants and exceptions were duly saved. (Trans. pp. 50, 61, 62, 63, 64.)

The court denied the defendants' motion for a new trial on March 25, 1924. (Trans, p. 29.) While preparing the proposed bill of exceptions for defendants, three days later, the then counsel for this plaintiff in error secured from the clerk of the District Court the Government exhibits. They consisted of a great mass of cards, slips and other documents. On examining them he discovered that Exhibits Nos. 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 20 and 21 were contained in envelopes with the words:

"Office of U. S. Attorney, Seattle, Wash.," printed on the outside and certain other inscriptions in writing, such as:

"Deposit slip to Credit Co.—Exp. Canada—Hagen had on person." "Bill came from Pielow's room 'Fred Moore' Bill."

"El 4583 W. El 5911, same No."

"U. S. vs. Ed Hagen from his person to be photographed." Card with secret No. on it presented by Ed Hagen—Hagen's person.

"Slips showing purchases."

"Rainier Club sales slips."

The exhibits were not in these envelopes when identified by the witnesses and admitted in evidence. The envelopes were not submitted in evidence, yet when the exhibits were given the jury they were in these envelopes and were taken by them jury into the jury room and considered by them. Counsel for plaintiff in error and the other defendants brought this newly discovered error to the attention of the trial court by filing a motion for reconsideration of their motion for a new trial. (Trans. p. 30.) This motion was by the trial court denied and exception allowed. (Trans. p. 37.)

The questions in the case are:

1. Was there a violation of the constitutional rights of the plaintiffs in error in the search of their dwelling and seizure of their papers?

2. Was the submission to the jury of envelopes not admitted in evidence and bearing prejudicial inscriptions thereon proper?

## ASSIGNMENT OF ERRORS OF ED. J. HAGEN

Now comes the defendant, Ed. J. Hagen, by Fred C. Brown, his attorney, and in connection with his petition for a writ of error herein assigns the fol-

lowing errors, which he avers occurred in the trial of said cause, which were duly excepted to by him, and upon which he relies to reverse the judgment entered against him herein:

I. The District Court erred in denying the defendant's motion to quash the indictment herein on the ground that said indictment was founded on documents and other articles seized in the residence without authority in law in violation of his rights under the Fourth Amendment to the Constitution of the United States.

II. The District Court erred in denying the defendant's petition for the return of documents, liquor and other articles seized by United States Government prohibition officers in the residence on the night of February 20, 1923, in violation of his rights under the Fourth Amendment to the Constitution of the United States.

III. The District Court erred in denying the defendant's motion for a directed verdict of not guilty made at the close of the evidence to prove a conspiracy between the defendants or to prove any overt act on the part of any defendant as charged in the indictment.

IV. The District Court erred in denying the defendant's motion for a new trial.

V. The District Court erred in pronouncing judgment upon the defendant.

VI. The District Court erred in admitting in evidence Plaintiff's Exhibit No. 2, being a ledger purporting to record their transactions in the sale of intoxicating liquors, and in overruling the defendant's objection thereto on the grounds that the same had been forcibly seized and taken from the residence in the night-time by United States Government prohibition agents without lawful authority and in violation of his rights under the Fourth Amendment to the Constitution of the United States; and that its reception in evidence was a violation of his rights under the Fifth Amendment to the Constitution of the United States, the same being one of the documents for the return of which the defendant has made timely applictaion on the ground of such unlawful seizure.

For the reasons set forth in the sixth assignment of error and which are for convenience incorporated herein by reference.

The District Court also erred as follows:

VII. In admitting in evidence Government Exhibit No. 3.

XIII. In admitting in evidence Government Exhibit No. 4.

IX. In admitting in evidence Government Exhibit No. 5.

X. In admitting in evidence Government Exhibit No. 6.

XI. In admitting in evidence Government Exhibit No. 7. (33)

XII. In admitting in evidence Government Exhibit No. 8.

XIII. In admitting in evidence Government Exhibit No. 9.

XIV. In admitting in evidence Government Exhibit No. 10.

XV. In admitting in evidence Government Exhibit No. 11.

XVI. In admitting in evidence Government Exhibit No. 12.

XVII. In admitting in evidence Government Exhibit No. 13.

XVIII. In admitting in evidence Government Exhibits No. 14 and 15.

XIX. In admitting in evidence Government Exhibits No. 17, 18, 19 and 20.

XX. In admitting in evidence Government Exhibits No. 21 and 22.

XXI. In admitting in evidence Government Exhibit No. 24.

XXII. In admitting in evidence Government Exhibit No. 25.

XXIII. In admitting in evidence Government Exhibit No. 26.

XXIV. In admitting in evidence Government Exhibit No. 27.

XXV. In admitting in evidence Government Exhibit No. 28.

XXVI. In admitting in evidence Government Exhibit No. 29.

XXVII. In admitting in evidence Government Exhibit No. 33. (34)

XXVIII. In admitting in evidence Government Exhibit No. 35.

XXIX. In admitting in evidence Government Exhibit No. 42.

XXX. The District Court erred in permitting the witness, William M. Whitney, to testify as follows over the defendant's objection that the same was immaterial and not a subject for expert testimony:

"Q. Mr. Whitney, in your experience as a Prohibition Director, I will ask you what the abbreviations are for intoxicating liquor for gin?

"MR. VANDERVEER. I object as immaterial and not a subject for expert testimony.

"THE COURT. He may answer.

A. "G."

"MR. VANDERVEER. It is not proven that these are any established abbreviations.

"THE COURT. I understand; he just asked what they are.

"Q. What is the abbreviation for Scotch?

"A. "S."

"MR. VANDERVEER. The same objections to run to each of these.

"THE COURT. Yes.

"Q. What is the abbreviation for Bourbon?

"A. "B."

"Q. What is the abbreviation for Three Star Hennessy?

"A. "Three Stars."

"Q. What is the abbreviation for Old Parr?

"A. "OP."

"Q. What is the abbreviation for Haig's Dimple?

"A. "HD," sometimes "P."

"Q. What is the abbreviation for Hill & Hill? (35)

"A. Well, it is usually "H&H," sometimes "LL."

"MR. VANDERVEER. Objection shown to each question. It is not a subject for expert testimony, and it is wholly immaterial.

"THE COURT. Yes; overruled.

"MR. VANDERVEER. Exceptions.

"Q. What is the abbreviation of Johnny Walker's Red Label?

"A. "JWRL."

XXXI. The District Court erred in denying the defendant's motion for a reconsideration of their motion for a new trial filed herein on March 29th, 1924.

XXXII. The District Court erred in denying and not granting the motion for a rehearing filed on April 23rd, 1924.

XXXIII. The District Court erred in signing and filing the order denying the motion for reconsideration of defendants' motion for new trial and motion for rehearing.

WHEREFORE, the said Ed. J. Hagen, plaintiff in error, prays that the judgment of said Court be reversed and this cause be remanded to said Circuit Court with instructions to dismiss same and discharge the plaintiff in error from custody and exonerate the sureties on his bail bond, and for such other and further relief as to the Court may seem proper.

## FINAL ISSUES.

The above errors may be grouped for the purpose of simplifying the argument into two fundamental questions which, therefore, become the main issues in the case.

## Errors One to Twenty-Nine, Inclusive, Rest upon Issue I.

Was there such a violation of the constitutional rights of the plaintiffs in error in the search of the dwelling house and seizure of his property, as to require the suppression of the evidence of the commission of the crime gained thereby?

## Errors XXXI, XXXII and XXXIII Rest Upon Issue II.

Was the submission to the jury of envelopes not admitted in evidence and bearing prejudicial inscriptions reversible error?

Error XXX will not be discussed.

## ARGUMENT.

At the threshold of this case we are met with a serious question, involving the constitutional rights of the plaintiff in error.

The Federal Courts have consistently enforced the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, even

though the result has been in many cases that the guilty man has gone unpunished, and it has held that this fundamental law protects him as well as the innocent.

*Weeks vs. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 Law Ed. 652.

*Atlantic Food Products Corp. vs. McClure*, 288 Fed. 982.

*United States vs. Bookbinder*, 278 Fed. 216.

*United States vs. Mitchell*, 274 Fed. 128.

*United States v. Kelih*, 272 Fed. 484.

As a corollary to this, it has been held that the success of an unlawful search does not make the result lawful.

*United States vs. Slusser*, 270 Fed. 818.

With these principles in mind, we shall proceed to discuss the first issue, to wit, the legality of the search and seizure of the property of the defendants and the use of the evidence so obtained against them.

## Issue I.

The Honorable District Court erred in overruling the motion of the plaintiffs in error to quash the indictment and for return or suppression of the evidence.

Point 1. The issuance of the search warrant was void, because

(1) The affidavit did not state facts showing probable cause.

It is, of course, elementary that under the statute (Sec. 3, Title 11, Act of June 15, 1917, commonly known as the Espionage Act) the affidavit filed as the basis for the issuance of a search warrant must state facts and not conclusions.

*Lochnane et al vs. U. S.* (decided by this court, opinion filed November 10, 1924).

*Atlantic Food Products Corp. vs. McClure*, 288 Fed. 982.

*Lipschutz vs. Davis*, 288 Fed. 974.

*U. S. vs. Harnich*, 289 Fed. 256.

*In re Rossenwasser Bros.*, 254 Fed. 171.

*Schencks vs. United States* (C. C. A.) 2 Fed. (2d) 185.

In this case Gordon B. O'Harra, prohibition agent, swore that "one Ed Hagen and employees on the 28th day of February, 1923, and thereafter was, has been and is possessing and selling intoxicating liquor all for beverage purpose on premises described as 122 Broadway, Seattle, Washington." (Trans. p. 22.) The foregoing is the only portion

of the affidavit that in the slightest degree tends to set forth any facts from which probable cause could be inferred. Nothing but mere conclusions are stated. The affidavit contains no facts from which the United States Commissioner could determine that probable cause existed for the issuance of a search warrant. The case cannot be distinguished from that of *Lochnane vs. United States Supra*, where on an almost identical affidavit your Honors held the search warrant void as based on an affidavit which failed to set forth facts sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant. Cases in which practically the identical language was used in the affidavit for the issuance of a search warrant as is now before the court in this case and in which the Federal Courts have held that a search warrant based on such affidavit was void, will be found as follows:

*Giles vs. United States*, 284 Fed. 208.

*United States vs. Illig*, 288 Fed. 939.

*United States vs. Yuck Kee*, 281 Fed. 228.

*United States vs. Kaplan*, 286 Fed. 963.

(2) It did not sufficiently describe the property to be seized.

SECTION 3, Title 11, Act of June 15, 1917, known as the Espionage Act, under which the search warrant was issued, provides the affidavit must particularly describe the property and place to be searched (1918 Sup. Fed. St. Ann., p. 129). The affidavit upon which this search warrant was issued gives absolutely no description of the property to be seized. Again, SECTION 6 of the same act provides the warrant must command the officer to search the person or place named for the "property specified." The warrant in this case commands the officer to "seize any and all of the said property in or about the commission of said crime." It fails, however, to describe any property whatsoever. (Trans. p. 19.) The failure of either the affidavit or the warrant to particularly describe the property to be seized renders the search and seizure thereunder void.

*United States vs. Boyd*, 1 Fed. (2d) 1019.

*Honeycutt vs. United States*, 277 Fed. 939.

*Lipschutz vs. Davis*, 288 Fed. 974.

(3) The United States Commissioner was without jurisdiction to issue a search warrant authorizing the seizure of written documents.

The National Prohibition Act furnishes the authority under which this warrant was issued. Section 25 thereof authorizes the issuance of search warrants for liquor or property designed for the manufacture of liquor (1919 Sup. Fed. St. Ann. p. 213). This section further provides that search warrants may issue under Title 11 of the Espionage Act for "such liquor and the containers thereof and such property." The proceedings being purely statutory, there is no basis in law for the issuance by the United States Commissioner in a liquor case of the search and seizure of books and documents.

It follows that the evidence of the crime in this case has been illegally acquired in that no valid search warrant was issued for the reasons that the search warrant issued was not based on a sufficient affadavit, did not particularly describe the property to be seized and could not issue for the seizure of written documents, that such evidence should be suppressed, and there being no other independent or competent evidence of guilt of the plaintiffs in error, the case should be reversed on this point and ordered dismissed.

*Lochnane vs. United States, Supra .*

*Boyd vs. U. S.*, 116 U. S. 616; 29 L. Ed. 746, 6 Sup. Ct. 524.

*Weeks vs. U. S.*, 232 U. S. 383; 59 L. Ed. 652; L. R. A. 1915 B. 734; 34 Sup. Ct. 341;

Ann. Cas. 1915 C 1177.

*Silverthorne Lumber Co. vs. U. S.*, 251 U. S. 385; 64 L. Ed. 319; 40 Sup. Ct. 182.

*Amos vs. U. S.*, 255 U. S. 313.

*Gouled vs. U. S.*, 255 U. S. 298; 41 Sup. Ct. 261.

*U. S. vs. Slusser*, 270 Fed. 819.

*U. S. vs. Falloco*, 277 Fed. 75.

*Honeycutt vs. U. S.*, 277 Fed. 939.

*Woods vs. U. S.*, 279 Fed. 706.

*Lambert vs. U. S.*, 282 Fed. 413, 414, 417.

*Giles vs. U. S.*, 284 Fed. 208.

*Snyder vs. U. S.*, 285 Fed. 1.

*U. S. vs. Case*, 286 Fed. 627.

*U. S. vs. Innelli*, 286 Fed. 731.

*U. S. vs. Kaplan*, 286 Fed. 963, 973.

*U. S. vs. Myers*, 287 Fed. 260.

*Ganci vs. U. S.*, 287 Fed. 60.

*U. S. vs. Leppe*, 288 Fed. 136.

*Pressley vs. U. S.*, 289 Fed. 477.

*U. S. vs. Musgrave*, 293 Fed. 203.

*Murby vs. U. S.*, 293 Fed. 849.

*Salata vs. U. S.* (C. C. A.) 286 Fed. 125, 126.

## Issue II.

The Honorable Trial Court erred in overruling the motion of the plaintiffs in error for reconsideration of their motion for a new trial.

It is undisputed that a large number of envelopes, which were not introduced in evidence and which, with notations thereon highly prejudicial to the defendants, were submitted to the jury and were considered by them in deliberating upon their verdict. (Trans. pp. 31, 32, 33, 34, 35, 36.) That it was prejudicial error to submit such evidence to the jury requires no serious discussion.

*Ogden vs. U. S.*, 112 Fed. (3 C. C. A.) 523.

*Alaska Com. Co. vs. Dinkelspiel*, 121 Fed. (9 C. C. A.) 318.

*Meyer vs. Calwalader*, 49 Fed. 32.

*U. S. vs. Clarke*, 25 Fed. Cas. No. 14810.

*Hutchinson vs. Decatur*, 12 Fed. Cas. No. 69556.

*Abbott vs. State* (Ga.) 100 S. E. 759.

*Warde vs. State* (Okla.) 162 Pac.

*Thomas vs. State* (Okla.) 164 Pac. 995,99.

We submit that it clearly appears that error was committed in the following material matters to the prejudice of plaintiff in error:

(1) The evidence upon which he was convicted was obtained by a violation of constitutional rights.

(2) The jury had before it documents not admitted in evidence highly prejudicial to plaintiff in error.

From both of these standpoints the conviction of the plaintiff in error was wrong. Being contrary to principle and precedent, we submit the judgment should be reversed, with direction to the lower court to grant the motion to suppress the evidence illegally seized and grant plaintiff in error a new trial.

Respectfully Submitted,

CARKEEK, McDONALD,
HARRIS & CORYELL,
Attorneys for Plaintiff in Error,
Edward Joseph Hagen.

In the

# United States Circuit Court of Appeals

## For the Ninth Circuit

No. 4351

ED J. HAGEN — Plaintiff in Error

vs.

UNITED STATES OF AMERICA — Defendant in Error.

Honorable Jeremiah Neterer, Judge

# Brief of Defendant in Error


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In the

# United States Circuit Court of Appeals

## For the Ninth Circuit

No. 4351

ED J. HAGEN — Plaintiff in Error

vs.

UNITED STATES OF AMERICA — Defendant in Error.

Honorable Jeremiah Neterer, Judge

## Brief of Defendant in Error

### STATEMENT OF THE CASE.

On February 20, 1923, Federal Prohibition agents, under authority of a search warrant, searched the premises of Mr. and Mrs. Brown and Annie Givens at 122 Broadway, Seattle, Washington. Certain liquors and other evidence was seized that night, most of which was taken from the room of ANNIE GIVENS. She had the custody of the books showing the dealings in intoxicating liquors. She was not indicted, but called by the government

as a government witness for the purpose of identifying the documents, and of course was a hostile witness. She testified that she kept the books, that she lived there with her father and mother, but that the defendant Hagen did not live there, and the record shows conclusively that he did not live there. The petition to suppress shows that it was made in behalf of the defendant Pielow, and not in the behalf of the defendant Hagen, and does not allege that he lived there. (Tr. 15.)

## ARGUMENT.

### I.

The only persons who may complain of a search and seizure are the owners in possession of premises; consequently no one but Mr. Brown, who is an acquitted defendant in this case and the owner of the premises at No. 122 Broadway, is in a position to complain, the record showing that Hagen did not live there. (Tr. 51.)

*Hale v. Hankel*, 201 U. S. 43;
*Bordeau v. McDowal*, 256 U. S. 465;
*Remus v. U. S.*, 268 Fed. 501;
*Haywood v. U. S.* 287 Fed. 69;
*Schwartz v. U. S.* 294 Fed. 528;
*McDaniel v. U. S.* 294 Fed. 769.

## II.

THE SUBMISSION TO THE JURY OF THE ENVELOPES WITH THE IDENTIFICATION MARKS UPON THEM WAS NOT ERROR.

The various sales slips taken from the room of Annie Givens, and various documents taken from the persons of the defendants, were enclosed in envelopes for the purpose of segregation and identification in court by the Assistant United States Attorney, and the contents of the envelopes were marked on the outside of the envelope, and were handled and used during the trial in this condition. THE CLERK'S IDENTIFICATION MARKS WERE PLACED UPON THE ENVELOPES, and they were identified during all stages of the trial by numbers, as the court may ascertain facts from an inspection of the impounded documents. Proof was offered during the trial as to everything that was written on the back of these envelopes. C. O. Myers has testified that for a number of years C. H. Brown had his telephone on a four-party line, and that this telephone had been changed on January 4, 1923, to a one-party line, and also the number had been changed (keeping in mind the fact that this conspiracy dated from December 15, 1922).

During the trial these exhibits were kept in the several envelopes, and were used on occasions while so enclosed, and in this manner were offered in evidence, tendered to counsel, and were accepted in evidence without abjection. (Tr. 78.)

In the motion for reconsideration of motion for the new trial (Tr. 32) counsel alleges *unavoidable casualty* (Tr. 30), but in his affidavit (Tr. 35) he says that he did not see "*nor sought to see them,*" though they were tendered to him at all times during the trial, objection being made to all of them at the time they were offered in evidence, upon the ground that the various documents were seized in violation of the defendants's constitutional rights, that being the sole and only objection made.

In the case of U. S. v. Edward J. Hagen, Edward W. Pielow, Charles Givens and Christopher Brown, the Court said:

"The defendants were tried and except as to Brown, were convicted. Motions for new trial and in arrest of judgment were filed and denied. The defendants Hagen and Pielow were sentenced to the Federal prison and Givens to the county jail. Petition for writ of error was filed and allowed, citation issued, defendants Pielow and Givens admitted to bail on the 24th day of March, and Hagen

on March 25th, 1924. On March 29th, the defendants severally moved the court for a 'reconsideration of their motion for a new trial herein and for an order vacating the verdict and granting them a new trial on the grounds specified in said motion and on the additional ground of unavoidable casualty and misconduct preventing them from having a fair trial, and more particularly, because as more fully specified in the affidavit of S. G. F. Vanderveer, there was submitted to the jury that tried said case and there were considered by said jury in arriving at their verdict a large number of envelopes containing inscriptions highly prejudicial to the defendants which were not admitted in evidence nor supported by any testimony in the case.' The affidavit sets out:

* * * That on the trial of said cause a great many cards, sales slips, memoranda and other documents were identified by various witnesses as papers taken from the possession of either the defendant, Ed. J. Hagen, or Ed. W. Pielow from the room of Annie Givens; that among other exhibits so identifiied were the following, to-wit: * * *

Then are enumerated Government's Exhibits 6, 7, 8, 10, 13 and 14, each consisting of a bundle of slips taken from the room of Annie Givens—Government's Exhibits 11, 12 and 15, each consisting of papers taken from the person of the defendant Hagen, Exhibit 15, consisting of a memorandum book and other papers taken from said defendant Hagen; Exhibit 18, consisting of papers taken from the possession of defendant Hagen; Exhibit 20, 'consisting of other papers which on

account of the present scrambled condition of the exhibits deponent is not able to specifically identify;' Exhibit 21, 'consisting of cards taken from the possession of defendant Hagen;' that * * * said papers and documents, as they were identified by the several witnesses and none of them were enclosed in any envelopes or other containers, nor were any envelopes or containers identified by the witnesses as a part of the exhibits.

"The affiant estimates that more than two hundred separate articles, papers, and documents were thus identified and admitted in evidence, the same having been kept from the date of seizure *'in the secret custody of government officials,' and 'deponent neither had nor sought an opportunity to examine them or study their contents; that because of their great volume deponent made no attempt to study said exhibits during the progress of the trial,* nor did he examine or comment on any of them in the course of his argument to the jury, and for all of said reasons deponent had no occasion to, nor did he ever inspect said exhibits after their identification by the various witnesses until the 27th day of March, 1924; that in the course of preparing the defandtns' proposed bill of exceptions he secured the same from * * * the Clerk for the purpose of preparing a descriptive list to supplement the transcript of testimony * * * and * * * discovered * * * that all of said exhibits * * * * except insofar as they had become disarranged, were contained in envelopes bearing certain inscriptions upon them, * * * 'Slips showing purchases,' 'Expenses,' 'Withdrawals by

Hagfien,' 'Slips showing withdrawals by Charley,' '20th slip on day of arrest—Sales slip,' 'Rainier Club Sales slip,' 'Slips showing expenses—see slip as to charity,' 'Slips showing def. handwriting and Anna's handwriting,' 'payments on the 31st,' 'Withdrawals Feb. 10th,'' Slip showing withdrawal of money by Hagen' and other similar inscriptions upon various other exhibits. It is stated that the envelopes were submitted to the jury.

"*The fact is that these several slips and memoranda had been enclosed in envelopes; these envelopes, with the slips enclosed, were presented to the witnesses for identification and the envelopes containing the slips were marked by the clerk and these envelopes, with the slips enclosed, were sent to the jury room.* (Italics mine.)

"Upon arraignment, the defendants moved to quash the indictment upon the ground that there had been submitted to the grand jury: 'A large number of letters, books, papers, memoranda, cards, accounts, and a number of bottles of intoxicating liquor unlawfully seized in the possession of the defendants * * * at their dwelling * * * upon a void search warrant * * * in violation of the defendants' rights and the 4th and 5th amendments to the Constitution of the United States.'

"There was also filed a motion and affidavit for a return of the books and memoranda and the suppression of the liquor as evidence in the case because of the unlawful seizure thereof in violation of the 4th and 5th amendments to the consti-

tution and of Title II of the Act of Congress of June 15, 1917. The motions to quash and for return and suppression of the evidence were denied. When these various evidentiary matters were offered in evidence upon the trial the defendants objected on the ground that

" 'The articles were seized from defendants unlawfully and without any warrant in law, and are the same articles which have heretofore petitioned for the return and suppression.'

"*It is needless to say that if the court's attention had been challenged by objection to the inclusion of the various slips in the several envelopes in which they were contained, when presented to the witnesses for identification and marked by the clerk, the envelopes would have been excluded from the jury.* During the course of the trial these exhibits were kept in the several envelopes. They were used upon the trial as occasion required while so enclosed, and in this manner were submitted to the jury for examination in the jury room." (Italics mine.)

Therefore, it would appear that counsel is relying upon his dereliction of duty in view of the character and seriousness of this case, endeavoring to make a mountain out of a mole mill. In view of the number of exhibits that were offered it would appear that it would have been *impossible* for counsel to have overlooked the documents, and is relying upon wilful conduct for reversal.

The decisions cited by counsel in his brief on page 21 are not in point:

"In Hutchinson v. Decatus, 12 Fed. Caces 1087, No. 6956, the jury without the defendant's consent and the same not having been introduced in evidence, had a paper containing a statement of the plaintiff's account in suit.

"In U. S. v. Clark, 25 Fed. Cases, page 454, No. 14810, the jury had the coroner's inquest, not in evidence, and depositions.

"In Meyer, et al. v. Cadwallader, 49 Fed. 32, an action extending several days, newspaper comments of gross nature, well calculated to prejudice a jury against one of the parties, were published during the trial, and after several attacks a motion was made by the attacked party to withdraw one of the jurors and to direct a re-trial.

"Ogden v. U. S., 112 Fed. 523 at 526. The jury was handed by an officer of the court the indictments, which were taken to the jury room with the other papers for their consideration, and on the back of the indictments was an endorsement of the findings of the jury in the former trial, finding the defendant guilty.

"Alaska Commercial Co. v. Dinkelspiel, 121 Fed. 318. A writing was offered, objected to, not admitted, marked for identification, and counsel was permitted to 'base an argument thereon' and the paper writing was sent out to the jury.

Waite v. State, 162 Pac. 1139-42. A written objection of the guardian *ad litem* to the report in

issue, filed by the defendant and not introduced in evidence, was sent to the jury room. The court said 'It may not be improper to add here that a prosecuting officer should see that when papers are being delivered to the jury no improper documents are included therein.'

"Thomas v. State, 164 Pac. 995-98. The court said: 'It appears that the entire transcript of the testimony given at the preliminary examination was upon request allowed to be taken to the jury room for the purpose of permitting the jury to read certain portions of such evidence introduced upon the trial, both as original and impeaching evidence. While it is not clear that the jury considered or read any of this evidence such as was introduced upon the trial of this case, it is clearly evident that the opportuity to receive and examine other evidence than that received in court was afforded." * * *

In the case of the United States of America v. Edward J. Hagen, Edward W. Pielow and Charles Givens, filed April 24, 1924, Judge Neterer said:

"From a misapprehension of the defendant Hagen's relation to the writ of error proceedings, to which he was not a party, it was concluded that the court had lost jurisdiction of all of the defendants. The memorandum of defendants filed April 22nd will be considered as a motion for rehearing.

"A re-examination of the record is conclusive that Pielow and Givens cannot complain, were not prejudiced, and had no right jeopardized or privi-

lege encroached upon by the memoranda upon the envelopes containing the various exhibits introduced and admitted in evidence, and the same may be said of the defendant Hagen, considering the connection in which used, or memoranda made, and in view of the testimony submitted, no right has been withheld or encroached upon, and no case has been presented, nor have I found any which goes to the extnt of saying that under the evidence before the court, the court would be warranted in granting an ew trial asc to the defendant Hagen, or to make application to the Circuit Court of Appeals for a return of the record and release of appellate jurisdiction to to Pielow and Givens to the end that this court may proceed fur in the case, as has been suggested may be proper in some decisions. See:

*Strand v. Griffin*, 135 Fed. 739;

*Cimiotti Co. v. Am. Mach. Co.* 99 Fed. 1003;

*Wagner v. Meccano*, 235 Fed. 890;
*Green v. United States;*

*Mossberg v. Nutter*, 124 Fed. 966;

*U. S. v. Mayer*, 235 U. S. 55.

"*There is nohting before the court to intimate that the jury considered the memoranda endorsed upon the envelopes, or that they were influenced thereby, and there is nothing in any of the memoranda from which the court can conclude that the jury might have been influenced, in view of the testimony and record.* The only issue, in my judgment, in this case is—were the documents and

memoranda, etc., admitted in evidence illegally seized? That is for the appellate court to determine, this court having concluded against the defendants. The court must decline to request the Circuit Court of Appeals to relinquish jurisdiction as to Pielow and Givens and the motion of the defendant Hagen is denied."

*Wells v. U. S.* 273 Fed. 625;

*Yaffe v. U. S.* 276 Fed. 497,Certiorari to Supreme Court denied;

*Smith v. U. S.* 267 Fed. 665, Certiorari denied in 256 U. S. 691;

*Rosen v. U. S.* 271 Fed. 651;

*Reeves v. U. S.* 263 Fed. 690 at 691;

*Kar Ru Chemical Co. v. U. S.* 264 Fed. 921 at 929—9th C. C. A.;

*Williams v. U. S.* 265 Fed. 625;

*Lane v. Leiter*, 237 Fed. 149.

In the case of *United States v. Yaffe, supra*, the court said:

"*A litigant cannot be permitted to trifle with a court and thereby secure a new trial upon questions not fully and fairly presented by the objection and exception.* The objection in this case was a general objection to the admission of the bottle and contents in evidence. There was nothing in the objection to suggest to the court that the objection was based upon the label attached to the bottle. If

the Court's attention had been directed to this label, it would probably have ordered that it be removed before the bottle and contents were admitted in evidence, and, if it had failed to do so, the question would have been fairly presented to the trial court and a ruling obtained thereon, the correctness of which ruling could be determined by a reviewing court. Evidence had been offered tending to prove that this bottle and its contents were purchased from the defendant through his bartender Kellum; that the contents of this bottle was 45 per cent alcohol or 90 proof whiskey. The objection was directed solely to the admission of this bottle and contents, and not to the label on the bottle, and therefore was properly overruled."

If the Court will consult the various exhibits, it is conclusively shown that the defendant could not be prejudiced by the writing, and are undoubtedly guilty from the evidence of the documents alone, and if any error was committed it was not prejudiced.

See 1246 C. S.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,

C. T. McKINNEY,
Assistant United States Attorney,
*Attorneys for Defendant in Error.*

No. 4353

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

WYATT LUMBER COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

COOLEY HARDWOOD MANUFACTURING COMPANY, a Corporation,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.**



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4353

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

R. CLARENCE OGDEN, Esq., San Francisco, California,

Attorney for Plaintiff and Appellee.

ALBERT I. LOEB, Esq., San Francisco, California,

Attorney for Defendant and Appellant.

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In the Superior Court of the State of California, in and for the County of Alameda.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

(COMPLAINT.)

Action upon Contract.

Now comes plaintiff and for cause of action against defendant, alleges:

I.

That plaintiff is a corporation existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Oakland, County of Alameda, State of California.

II.

That defendant, this plaintiff is informed and

believes and upon such information and belief alleges, is a corporation existing under and by virtue of the laws of the State of Louisiana with its principal place of business at Ruston, Louisiana.

III.

That defendant has not filed a certified copy of its Articles of Incorporation with the Secretary of State of the State of California, and has not designated to said Secretary of State any person or agent residing in the State of California, or at all, upon whom process issued according to law can be served as the agent of defendant, and said defendant has refused, failed and neglected to perform any and all of the acts required of it by the laws of the State of California, and particularly that certain law set forth in Statutes [1*] 1917, page 371; that said defendant has property within the State of California, subject to execution.

IV.

That R. H. Cooley was, during all the times herein mentioned, an individual doing business in the City of Oakland, County of Alameda, State of California, under the fictitious name of R. H. Cooley Mfg. Co., certificate whereof is on file in the office of the County Clerk, together with an affidavit of publication of said certificate as provided by law.

V.

That Said R. H. Cooley, doing business under said fictitious name, and the said defendant en-

*Page-number appearing at foot of page of original certified Transcript of Record.

tered into a contract upon the date and dates in the city of Oakland, county of Alameda, State of California, for the delivery of lumber in the city of Oakland, county of Alameda, State of California, in words and figures as follows:

WYATT LUMBER COMPANY, LTD.,
Ruston, Louisiana, June 15th, 1922.

R. H. Cooley Mfg. Co.,
Oakland, Cal.,

Gentlemen:

With reference to your wire asking our price on 5/4 #1 and #2 Common Plain White Oak:

Since wiring you our quotation we have a chance to contract for five to eight hundred thousand feet of White Oak to be cut any thickness we require. It has occurred to the writer that we might have this stock sawn out for you all 5/4 thick, the same to remain on sticks four months after that time ship eighty or ninety thousand feet per month. The price covering this contract will admit us naming you a price of $85.00 per M. Feet on the #1 Common & Selects and the #2 Common at $64.00—all delivered your city—all rail rate. [2]

We have made up our minds to buy this stock as it is nice timber—of good size and long clean bodies. However, before giving them cutting instructions we will await your reply to this letter advising us if or not you would give us a contract covering five to eight hundred thousand feet as above described.

Awaiting the favor of a prompt response we beg with best wishes, to remain,

Yours very truly,
WYATT LUMBER CO., LTD.
By W. H. PERKINS.

WHP/DSP.

"Oakland, Cal., June 20, 1922.

Wyatt Lumber Co.,
Ruston, La.

Accept your offer June 15 for contract 500 M 5/4 one common plain white oak Letter following.

R. H. COOLEY."

R. H. COOLEY MANUFACTURING CO.
Hardwood Flooring.

Oakland, California, June 20, 1922.

Wyatt Lumber Co.,
Ruston, La.

Gentlemen:

We wired you today accepting you offer of June 15th.

We will contract with you for 500,000 feet of plain white oak to be sawn 5/4 thick and placed on sticks until dry enough to ship. We are very anxious to get this stock as we have bought oak enough to last only until the middle of September. If any of it is in shipping condition by this time we would like to get it.

We have never used any #2 common oak in running our flooring and do not know whether it pays to ship it under such a high freight rate. If yours

is a good grade of #2 we believe we can use 25% of #2 common.

In sawing this oak we wish it to be full 5/4″ thick as we resaw it to make three strips and must watch the thickness very closely. The wider the boards are the less edge waste there is. Our only fault to find with the oak we have had from you has been that the stock runs narrow than oak from Arkansas. For this reason we can make more flooring from Arkansas oak than your oak. In sawing this oak it would be well to give the instructions to the edger man to cut the boards as wide as possible. If we [3] 25% of #2 he can leave the #2 where possible on the same board with the #1 and give us a wider stock. For this reason we have considered taking log run so as not to cut the boards narrow. You might figure up and see if it would be to our mutual advantage to ship it log run. 20″ is the widest we would want.

In shipping this oak we would want it shipped with National Certificate attached. If there is a dry kiln anywhere near there that could dry the stock in transit, we could ship the green lumber to them and have it dried before shipping here and possibly speed up the delivery some.

As this oak will not be ready for shipment until so late in the year we doubt if we can use as much as 80,000 throughout the winter months and may have to drop down to 60,000 about Jan. 1st. At present the demand is very heavy and we are running over time to fill our orders. We wish we could extend our plant to take care of the business

offered us but being a small outfit we must take our time and not overstep ourselves by too rapid expansion.

Trusting this will be satisfactory to you, we remain,

Very truly yours,

R. H. COOLEY MFG. CO.

By R. H. COOLEY.

RHC/C.

WYATT LUMBER COMPANY, LTD.

Ruston, Louisiana, June 21st, 1922.

R. H. Cooley Mfg. Co.,

Oakland, Calif.

Gentlemen:

We just received your night letter of the 20th instant advising you accept our offer of the 15th instant—500,000 feet 5/4 #1 & 2 Common Plain White Oak.

Please be advised that we have not as yet closed up with the mill that proposes the cut this stock. However, we feel that the trade will be made and in the event it is made the stock will be cut for your account.

However, we do not want this contract to go into force until our trade with the mill is consummated, and will advise you in the next few days if or not we have taken the cut over.

With best wishes beg to remain,

Yours very truly,

WYATT LUMBER CO., LTD.

By W. H. PERKINS.

WHP:DSP. [4]

WYATT LUMBER COMPANY, LTD.

Ruston, Louisiana, June 26th, 1922.

R. H. Cooley Mfg. Company,
Oakland, California.

Gentlemen:

In this morning's mail we received your kind favor of the 20th inst., advising that you will contract with us for 500,000′ of plain white oak to be sawn 5/4″ thick.

Your letter seems to be in line with our ideas with the exception that you advise that you want National Certificate attached to each car covering inspection. In this connection wish to advise that we never shipped lumber in this manner. We have shipped a great quantity of oak lumber to the Pacific Coast and have never had any serious trouble over inspection and measurement. We are perfectly willing to book this business with the understanding that we ship stock that will be identically the same grade as shipped you through the American Trading Company, the 150,000′ of 4/4 #1 Common Plain White Oak, and in loading this stock we will brand the #1 Common a certain grade mark and the #2 Common another grade mark, which will enable you to designate the two grades. We would not for a moment ask you to take #2 Common for #1 Common.

We would expect to ship you #1 Common stock that will cut 66⅔% clear of face cuttings, and the #2 Common will be inspected so the boards will work 50% clear face cuttings, and in the #1 com-

mon will be included all the selects produced from the log.

As to using #2 common for flooring, our plants throughout the central part of the county are using full 50% #2 Common grade and they are evidently making money or they would not buy this percentage of #2, and the combined grades reduces your delivered price several dollars per thousand feet, and see no reason why this policy would not be a good one for you.

We booked the other order from you through the American Trading Company. Will this order be handled likewise? It is essential that we have this information, as we presume that these shipments will be settled for less 2% five days after arrival to your city.

Kindly advise us promptly regarding the inspection and shipment of this stock, and it is entirely possible that we can begin shipment the latter part of September.

Will ask you to kindly wire us on receipt of this letter if this is entirely satisfactory.

With best wishes, beg to remain,

Yours very truly,

WYATT LUMBER COMPANY, LTD.

By W. H. PERKINS. [5]

WHP/gln.

"Oakland, Calif., July 1, 1922.

Wyatt Lbr. Co.,

Ruston, La.

Inspection satisfactory. Will handle this order

ourselves without A. T. Co. according to your terms. Advise if you have purchased the timber.

R. H. C. CO."

WYATT LUMBER COMPANY, LTD.

Ruston, La., July 3, 1922.

R. H. Cooley Mfg. Co.,
Oakland, Cal.

Gentlemen:

We received your wire today dated the 2nd inst. reading INSPECTION SATIS*FSC*TORY WILL HANDLE THIS ORDER WITHOUT A. T. CO. ACCORDING YOUR TERMS ADVISE IF YOU HAVE PURCHASED THE TIMBER.

We are pleased to advise that we have bought this timber and are now cutting the white oak into 5/4 stock and will put same on sticks as quickly as possible, and as soon as the stock has been on sticks four months we will begin shipment.

The writer wrote you yesterday with reference to you buying 175 to 200,000′ 5/4 Red Oak, same grade as the White Oak and we hope on receipt of that letter you will promptly advise us that we may go ahead and cut the Red Oak in connection with the 500,000′ of the 5/4 Plain White Oak. I am suggesting this for the reason am sure that it is a good purchase, as Oak Lumber is advancing in price and before Fall will bring more money than at this time. Another reason is we would like to cut the Red Oak into 5/4 thickness making the order read both White and Red Oak about 700,000′, both woods to be shipped separately. Therefore,

hope you can see your way clear to increase your order to 700,000 thereby, including the 200,000′ of Plain Red Oak.

You may, if you have not already done so mail us your formal order covering the 500,000′ of White Oak and will appreciate very much the order for 175 to 200,000 of the Plain Red Oak. We thank you very much for this order and assuring you the same will have our prompt and careful attention, we beg with best wishes to remain.

Yours very truly,

WYATT LUMBER CO.

By W. H. PERKINS.

WHP:LP. [6]

R. H. COOLEY MANUFACTURING CO.

Hardwood Flooring.

Oakland, California.

July 14th, 1924.

Wyatt Lumber Co.,

Ruston, La.

Gentlemen:

Please saw and ship when shipping dry, 500,000 feet of 5/4″ plain white oak. 75% of this to be graded #1 common and selects and 25% #2 common. Ship 80,000 per month when dry. The price to be $85.00 on #1 common and selects and $64.00 on #2 common. Price F. O. B. Oakland, Cal., all rail shipment. The grades to be marked so as to be identified at this end and each grade piled in the cars separately. #1 common grade to cut 66–⅔% clear cuttings and #2 common to cut

50% clear cutting. Both grades to be sawn as wide as possible and 50% or more 14 and 16 feet long. This lumber to be paid for as follows. After deducting freight the balance of invoice to be discounted 2% within five days of arrival of each car.

Very truly yours,
R. H. COOLEY MFG. CO.

VI.

That thereafter, on the 20th day of November, 1922, said R. H. Cooley assigned to this plaintiff said contract, and thereafter this plaintiff notified said defendant of said assignment; that thereafter said defendant delivered to this plaintiff at Oakland, California, the following amounts of lumber and no other amounts:

February, 1923—11.4 M feet #1 Common & Select and 3.066 M feet #2 Common.

March, 1923—15.032 M feet #1 Common and Select and 1.014 M feet #2 Common.

that thereafter the market price of said lumber increased to the sum of $98.00 f. o. b. Oakland for No. 1 Common and Select, and $76.00 f. o. b. Oakland, No. 2 Common.

VII.

That thereafter, on the 4th day of April, 1923, the said defendant notified this plaintiff that it did not intend to complete said contract and has ever since refused and now refuses to complete the performance of said contract, and has failed and refused and still fails and refuses to deliver said

balance of lumber, to wit, 469,488 feet No. 1 Common and Select 5/4 Plain White Oak and No 2 Common Plain Oak to the damage of this plaintiff in the sum of $5,633.85. [7]

And for a separate and second cause of action this plaintiff alleges:

I.

Plaintiff here repeats paragraphs I, II, III, IV, and V, VI and VII of its first cause of action by reference thereto and prays that the same may be taken as though again set forth at length.

II.

That Plain White Oak is not manufactured in the thickness, to wit, 5/4 inch, called for in said contract hereinabove set forth, in sufficient quantities to be of use to this plaintiff except by special order and request, and said contract called for the manufacture of Plain White Oak in dimensions not ordinarily cut by manufacturers of Plain White Oak and in dimensions particularly suitable to the requirements of this plaintiff.

III.

That it required at least 150 days from the placing of order for the cutting of lumber to particular dimension until said lumber so cut can be manufactured, cured and delivered in Oakland, California, and this plaintiff was unable for said reason to procure lumber manufactured to the dimension hereinabove referred to to replace the quantities undelivered by said defendant for a period of five months from the date of the refusal of said defendant to complete its contract, all of

which fact and facts were known to said defendant at the time said defendant entered into said contract and at all other times herein mentioned.

IV.

That this plaintiff can and has made $10.00 per thousand feet of lumber manufactured by manufacturing its product out of lumber but particularly to the dimensions called for in said contract over and above the profit it can or does make out of lumber ordinarily carried in stock and procurable on the open market. [8]

V.

That this plaintiff is engaged in the business of manufacturing said lumber into oak flooring strips which is the same business which said R. H. Cooley, operating under the fictitious name of R. H. Cooley Manufacturing Company, was engaged in at the time said contract was made, and the difference in profit hereinabove set forth was and is the same difference in profit which would have accrued to said R. H. Cooley, plaintiff's assignor, and that by reason of said defendant's refusal to complete its contract this plaintiff was damaged in the sum of $10.00 for each 1000 feet of lumber which defendant refused to deliver, to wit, the sum of $4,694.90.

WHEREFORE, plaintiff prays judgment against defendant and against defendant's property situate in the State of California, in the sum of $5,633.85, general damages and $4,694.90 special damages, together with costs of this action and

for such other and further relief as to the Court may seem meet in the premises.

(S.) R. CLARENCE OGDEN,
Attorney for Plaintiff. [9]

County of Alameda,
State of California,—ss.

R. H. Cooley, being first duly sworn, deposes and says that he is vice-president of plaintiff corporation, that he has read the foregoing complaint and knows the contents therein stated to be true of his own knowledge except as to those matters therein stated upon his information and belief and as to those matters that he believes it to be true.

R. H. COOLEY.

Subscribed and sworn to before me this 5th day of September, 1923.

W. E. ADAMS,
Deputy County Clerk in and for the County of Alameda, State of California.

[Endorsed]: Filed Sep. 5, 1923. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy Clerk. [10]

Superior Court of the State of California in and for the County of Alameda.

COOLEY HARDWOOD MANUFACTURING CO., a Corp.,

Plaintiff,

vs.

WYATT LUMBER CO., LTD., a Corp.,

Defendant.

## SUMMONS.

The People of the State of California to Wyatt Lumber Co., Ltd., a Corp., Defendant.

You are hereby directed to appear and answer the complaint filed in the county of Alameda in an action entitled as above, brought against you in the Superior Court of the State of California in and for the county of Alameda, within ten days after the service on you of this summons—if served within this county, or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court of the State of California in and for the county of Alameda, this 5th day of September, 1923.

[Seal] GEO. E. GROSS,
Clerk.
By W. E. Adams,
Deputy. [11]

In the Superior Court of the State of California in and for the County of Alameda.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LMTD.,

Defendant.

## AFFIDAVIT OF ATTACHMENT.

State of California,
County of Alameda,—ss.

R. H. Cooley, being duly sworn, deposes and says that he is vice-president of the plaintiff corporation and for that reason makes this affidavit on behalf of said plaintiff corporation; affiant states that the defendant is indebted to plaintiff in the amount of $10,328.75 over and above all legal set-offs and or counterclaims upon a contract, to wit, an implied contract for the direct payment of money, and that such contract was made in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property or any pledge of personal property, and that the defendant is a foreign corporation and has not filed a certified copy of its articles of incorporation with the Secretary of State of this state; and this attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud *and* creditor of the defendant.

R. H. COOLEY.

Subscribed and sworn to before me this 5th day of September, 1923.

W. E. ADAMS,
Deputy County Clerk in and for the County of Alameda, State of California.

[Endorsed]: Filed Sep. 5, 1923. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy. [12]

(Title of Court and Cause.)

ORDER FOR PUBLICATION OF SUMMONS.

IT APPEARING TO THE COURT from the affidavit on file and the verified complaint herein on file that the defendant is a corporation existing under the laws of the State of Louisiana, and has not filed a certified copy, or any copy, of its articles of incorporation with the Secretary of State of the State of California, and

IT FURTHER APPEARING that said defendant has not designated any person within the State of California upon whom service may be made for it of process issued out of and under the authority of the courts of this state; and

IT FURTHER APPEARING to this Court by said affidavit and verified complaint that said corporation has a place of business at Ruston, Louisiana, where officers of this corporation reside,—

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the

summons issued in the above-entitled matter be made upon the said defendant Wyatt Lumber Company, L*dt.,* a corporation, by publishing a copy of said summons in the "Inter-City Express," the newspaper hereby designated as the paper most likely to give notice to the said defendant, once a week for two consecutive months and that a copy of said summons with a copy of said complaint be forthwith deposited in the postoffice at the city of Oakland, county of Alameda, State of California, postage prepaid and directed to the Wyatt Lumber Company, Ltd., Ruston, Louisiana.

Done in open court this 7th day of September, 1923.

JOSEPH S. KOFORD.

[Endorsed]: Filed Sep. 7, 1923. Geo. E. Gross, County Clerk. By Geo. H. Stricker, Deputy. [13]

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In the Superior Court of the State of California in and for the County of Alameda.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

THE WYATT LUMBER COMPANY, LMTD.,

Defendant.

## AFFIDAVIT FOR PUBLICATION OF SUMMONS.

State of California,
County of Alameda,—ss.

R. Clarence Ogden, being duly sworn, deposes and says that he is attorney for plaintiff corporation; that defendant is a foreign corporation; that affiant has inquired of the Secretary of State of the State of California and has been informed by said Secretary of State that there is no person designated by said defendant corporation residing within this state upon whom process issued by authority of law may be served as the representative of said corporation, for such purpose and has ascertained that said defendant corporation has not filed a certified copy of its articles of incorporation with the Secretary of State of California, and therefore affiant states that the defendant corporation has no officer or agent or other person upon whom summons may be served who after due diligence or at all, may be found within this state.

And affiant further states that plaintiff corporation has under and by virtue of a writ of attachment a lien upon personal property belonging to defendant corporation which personal property is within the State of California and which personal property by virtue of said attachment and this action this plaintiff seeks through this action to subject said property to the satisfaction of the indebtedness of defendant to plaintiff as set forth

in the complaint herein on file and hereby [14] referred to.

And this affiant further states that defendant corporation has its principal place of business at Ruston, Louisiana, and also has a place of business at or near Gandy, Louisiana, and that its officers and agents are all residents of said State of Louisiana.

R. CLARENCE OGDEN.

Subscribed and sworn to before me this 7th day of September, 1923.

[Seal] J. C. LANEY,

Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Sep. 7, 1923. Geo. E. Gross, County Clerk. By Geo. H. Stricker, Deputy. [15]

AMERICAN TRADING COMPANY.

(Pacific Coast.)

Imported and Domestic Hardwood Lumber, Logs, Veneers, etc.

332 Pine Street,

Office—244 California St.,

San Francisco, Cal.,

San Francisco Yard, Foot of Powell St.

Refer to File No. 399–C

Sept. 24th, 1923.

Thomas F. Finn, Esq.,

Sheriff of San Francisco County,

San Francisco, California.

Wyatt Lumber Company, Ltd., a Corporation.

Dear Sir:

Referring to notice served upon us today regarding monies etc., due the Wyatt Lumber Company, Ltd., will say that we have no further monies due or owing this company other than the amount given in our letter to you of September 5th written in answer to attachment served on that date.

Yours very truly,
AMERICAN TRADING COMPANY.
(Pacific Coast.)
J. S. LAMBERT,
Hardwood Department.

JSL/LH.

Sheriff's Office. Received Sep. 25, 1923, —— o'clock, —— M., San Francisco. [16]

RETURN OF GARNISHMENT.

Office of the Sheriff of the City and County of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the 24th day of September, A. D. 1923, at 11:50 o'clock A. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of American Trading Co. belonging to the defendants named in said writ, or to either of them, by delivering to and leaving with T. E. Reade, cashier personally, in the city ond county of San Francisco, a copy of said writ with *with* a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to anyone but myself.

Statement demanded.

Answers as follows, to wit: No answer.

THOMAS F. FINN,
Sheriff.
John F. Whelan,
Deputy Sheriff. [17]

AMERICAN TRADING COMPANY.
(Pacific Coast.)
Imported and Domestic Hardwood Lumber, Logs, Veneers, etc.
332 Pine Street.
Office—244 California St.,
San Francisco, Cal.

San Francisco Yard
Foot of Powell St.

Refer to file
No. 399–C.

September 18, 1923.

Mr. Thomas F. Finn, Esq.,
Sheriff of San Francisco County,
San Francisco, California.

Dear Sir:

Wyatt Lumber Co., Ltd. (a Corporation).

Referring to notice served upon us today regarding monies, etc., due the Wyatt Lumber Company, Ltd., will say that we have no further monies due or owing this company other than the amount given in our letter to you of September 5th written in answer to attachment served on that date.

Yours very truly,
AMERICAN TRADING COMPANY,
(Pacific Coast.)
J. S. LAMBERT,
Hardwood Department.

JSL/ND.

Sheriff's Office. Received Sep. 19, 1923, —— o'clock, —— M., San Francisco. [18]

RETURN OF GARNISHMENT.

Office of the Sheriff of the City and County of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the 18th day of Sept., A. D. 1923, at 9:40 o'clock A. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of American Trading Co., a corporation, belonging to the defendants named in said writ, or to either of them, by delivering to and leaving with F. Reade, Ass't Treasurer, personally, in the city and county of San Francisco, a copy of said writ with *with* a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to anyone but myself.

Statement demanded.

Answer as follows, to wit: Nothing due.

THOMAS F. FINN,
Sheriff.
By W. J. Cash,
Deputy Sheriff. [19]

AMERICAN TRADING COMPANY.
(Pacific Coast.)
Imported and Domestic Hardwood Lumber, Logs, Veneers, etc.
332 Pine Street,
Office—244 California Street.
San Francisco, Cal.

San Francisco Yard
Foot of Powell St.

Refer to File
No. ——.

September 15, 1923.

Mr. Thomas S. Finn,
Sheriff,
San Francisco, Calif.
Wyatt Lumber Company.

Dear Sir:

Referring to notice of attachment served upon us to-day regarding monies due the Wyatt Lumber Company, Ltd., will say that we have no further monies due or owing this company other than the amount given in our letter of September 5th, written in answer to attachment served on that date.

Yours very truly,
AMERICAN TRADING COMPANY.
(Pacific Coast.)
F. KUMMERLANDE,
Hardwood Department.

FK/ND.

Sheriff's Office. Received Sep. 17, 1923, —— o'clock —— M., San Francisco. [20]

## RETURN OF GARNISHMENT.

Office of the Sheriff of the City and County of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the 14th day of Sept., A. D. 1923, at 4:35 o'clock P. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of American Trading Co. belong to the defendants named in said writ, or to either of them, by delivering to and leaving with F. Reade, Ass't Treasurer, personally, in the city and county of San Francisco, a copy of said writ with *with* a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to anyone but myself.

Statement demanded.

Answers as follows, to wit: Nothing here.

THOMAS F. FINN,
Sheriff.
W. J. Case,
Deputy Sheriff. [21]

AMERICAN TRADING COMPANY.
(Pacific Coast)
Imported and Domestic Hardwood Lumber, Logs, Veneers, etc.,
332 Pine Street,
Office—244 California St.,
San Francisco, California.

San Francisco Yard
Foot of Powell St.

Refer to file
No. 399–C.
September 11, 1923.

Thomas F. Finn, Esq.,
Sheriff of San Francisco,
San Francisco, California.

Dear Sir:

Wyatt Lumber Company, Ltd., a Corporation.

Referring to notice served upon us to-day regarding monies, etc., due the Wyatt Lumber Company, Ltd., will say that we have no further monies due or owing this company other than the amount given in our letter to you of September 5th, written in answer to attachment served on that date.

Yours very truly,
AMERICAN TRADING COMPANY.
(Pacific Coast.)
F. KUMMERLANDER,
Hardwood Department.

FK/ND.

Sheriff's Office. Received Sep. 12, 1923, —— o'clock —— M., San Francisco. [22]

RETURN OF GARNISHMENT.

Office of the Sheriff of the City and County of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the 11th day of Sept., A. D. 1923, at 12:30 o'clock P. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of American Trading Co., a corp., belong to the defendants named in said writ, or to either of them, by delivering to and leaving with N. J. Beniidge, Cashier, personally, in the city and county of San Francisco, a copy of said writ with *with* a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to anyone but myself.

Statement demanded.

Answers as follows, to wit: No answer.

THOMAS F. FINN,
Sheriff.
John H. Whelan,
Deputy Sheriff. [23]

AMERICAN TRADING COMPANY.
(Pacific Coast.)
Exports, Imports, Shipping and Commission.
San Francisco, California,
332 Pine Street.

Cable Address:
"Turnhand"
All Standard Codes used.

File 399–C.
September 5, 1923.

Refer to Letter.

Thomas F. Finn, Esq.,
Sheriff of San Francisco,
San Francisco, California.
Wyatt Lumber Co., Ltd.

Dear Sir:

Referring to notice served upon us to-day, regarding monies, etc, due or owing the Wyatt Lumber Co., Ltd., will say that we have $877.00 due, and $582 owing but which will be due September 10th.

Yours very truly,
AMERICAN TRADING COMPANY,
(Pacific Coast.)
F. KUMMERLANDER,
Hardwood Department.

FK/HB.

Sheriff's Office. Received. Sep. 6, 1923, —— o'clock —— M., San Francisco. [24]

RETURN OF GARNISHMENT.

Office of the Sheriff of the City and County of San Francisco.

By virtue of the annexed writ, I duly attached and levied upon, on the 5th day of September, A. D. 1923, at 4:5 o'clock P. M., all moneys, goods, credits, effects, debts, due or owing; or any other personal property in possession or under control of American Trading Co. belong to the defendants named in said writ, or to either of them, by delivering to and leaving with J. N. Raymond, Cashier, personally, in the city and county of San Francisco, a copy of said writ with *with* a notice in writing that such property was attached and levied upon, and not to pay or transfer the same to anyone but myself.

Statement demanded.

Answers as follows, to wit: Will hold.

THOS. F. FINN,
Sheriff.
By Wm. Wolff,
Deputy Sheriff. [25]

Superior Court of the State of California in and for the County of Alameda.

COOLEY HARDWOOD MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LIMITED, a Corporation.

## WRIT OF ATTACHMENT.

The People of the State of California to the Sheriff of the City and County of San Francisco.

The above-entitled action has been commenced in the Superior Court of the State of California in and for the county of Alameda by the above-named plaintiff to recover from the above-named defendant the sum of Ten Thousand Three Hundred Twenty-eight and 75/100 Dollars, or thereabout, and interest, and costs of suit and the necessary affidavit and undertaking have been filed as required by law.

You are, therefore, hereby required to attach and safely keep all the property of the said defendant, or either of them, within your county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff demand against the said defendant as above mentioned unless the defendant in the said action whose property has been or is about to be attached give you security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand against such defendant, besides costs, or in an amount equal to the value of the property of such defendant which has been or is about to be attached; in which case you will take such undertaking.

Make due and legal service and return hereof.

Given under my hand and the seal of the Superior Court of the State of California in and for

the county of Alameda, this 5th day of September, 1923,

[Seal] GEO. E. GROSS,
Clerk.
By W. E. Adams,
Deputy Clerk. [26]

Received Sheriff's Office. Received Sep. 5, 1923, —— o'clock, —— M., San Francisco.

[Endorsed]: Filed Sep. 26, 1923. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy. [27]

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In the Superior Court of the State of California in and for the County of Alameda.

No. 74,498—Dept. ——.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

DEMURRER.

I.

Now comes the defendant and demurs to plaintiff's alleged first cause of action in plaintiff's complaint on file herein, and for cause of demurrer alleges:

1. That same does not state facts sufficient to

constitute a cause of action against the defendant.

2. That said is unintelligible in that;

a. It cannot be determined therefrom whether the correspondence set out in said cause of action as constituting the said alleged contract contains all the correspondence between the parties at or about or previous to the times in said complaint alleged as to date on which said contract was entered into,

b. Whether the assignment alleged in Paragraph IV was for a valuable consideration and whether the assignee assumed and obligated itself to perform its part of said alleged contract with defendant.

c. How, when, that is at what time or times, and in what manner plaintiff suffered damages by the alleged wrongful acts of defendant.

d. How, and in what manner and at what time plaintiff arrives at and computes its alleged claim for damages. [28]

e. Whether the damage alleged grows out of a failure to manufacture or a failure to deliver.

3. That same is ambiguous for the same reasons herein stated that the same is unintelligible.

4. That the said first cause of action is uncertain for the same reason herein stated in which it is set forth that the same is unintelligible.

II.

The defendant demurs to plaintiff's alleged second cause of action as set forth in its said complaint and for cause of demurrer alleges:

1. That same does not state facts sufficient to

constitute a cause of action against the defendant.

2. That same is unintelligible in that:

(a) It cannot be determined therefrom whether the correspondence set out in said cause of action as constituting the said alleged contract contains all of the correspondence between the parties at or about or previous to the times in said complaint alleged, as to the date on which said contract was entered into,

(b) Whether the assignment alleged in Paragraph IV was for a valuable consideration and whether the assignee assumed and obligated itself to perform its part of said alleged contract with defendant,

(c) How, when, that is at what time or times, and in what manner plaintiff suffered damages by the alleged wrongful acts of defendant,

(d) How and in what manner and at what time plaintiff arrives at and computes its alleged claim for damages. [29]

(e) Whether the damage alleged grows out of a failure to manufacture or a failure to deliver.

3. That same is ambiguous for the same reasons herein stated that the same is unintelligible.

4. That the said second cause of action is uncertain for the same reason herein stated in which it is set forth that the same is unintelligible.

WHEREFORE defendant prays that it may be dismissed hence with its costs.

ALBERT I. LOEB,
Attorney for Defendant.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that the foregoing demurrer, in his opinion, is well taken in the point of law, and is not interposed for the purpose of delay.

ALBERT I. LOEB,
Attorney for Defendant.

[Endorsed]: Filed Nov. 14, 1923. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy Clerk.

Copy received Nov. 13, 1923.

R. C. OGDEN,
Atty. for Pltf. [30]

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In the Superior Court of the State of California in and for the County of Alameda.

No. 74,498—Dept. ——.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

PETITION FOR REMOVAL.

To the Honorable Judge of the Above-entitled Court:

Now comes your petitioner, Wyatt Lumber Company, Ltd., the above-named defendant by its at-

torney Albert I Loeb, and respectfully represents to this Honorable Court:

1. That on the 5th day of October, 1923, the above-named plaintiff filed a complaint in the Superior Court of Alameda County, State of California, praying for a judgment against the defendant for the sum of $10,328.75, with interest from said date upon an alleged breach of contract for the manufacture of lumber.

2. That on said date, and immediately after filing said complaint the said plaintiff caused to be issued out writs of attachments and caused said writs of attachments to be delivered to the sheriffs of San Francisco County, Tulare County, Fresno County, Madera County, San Joaquin County, Alameda County, Stanislaus County and Contra Costa County, State of California, with instructions to levy upon property of your petitioner in said counties of San Francisco, Tulare, Fresno, Madera, San Joaquin, Alameda, Stanislaus and Contra Costa, State of California.

3. Your petitioner further avers that the time has not elapsed wherein your petitioner is allowed under the practice and laws of the State of California and the rules of said Court to appear, plead, demur, or answer said complaint. [31]

4. Your petitioner further avers that at the time of the cemmencement of said suit, and ever since then, and at the present time the plaintiff in said action, Cooley Hardwood Manufacturing Co., a corporation, was and is a corporation or-

ganized and existing under and by virtue of the laws of the State of California, and was a citizen and resident of the State of California, having its principal place of business in the City of Oakland, County of Alameda, State of California, and the defendant, at the time of the commencement of said action was, and ever since has been and still is, a citizen of the State of Louisiana, and a resident thereof, residing at the City of Ruston, in said State of Louisiana.

5. Your petitioner further avers that this is a controversy between citizens of different States and more than Two Thousand ($2,000.00) Dollars, exclusive of interest and costs, is involved therein.

Your petitioner herewith presents a good and sufficient bond as provided by the statute in such cases, that it will, on or before the first day of the next ensuing session of the United States District Court, for the Southern Division, Northern District of Cailfornia, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said Court, if the said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as

provided by law, and as in duty bound your petitioner [32] will ever pray.

WYATT LUMBER COMPANY, LTD.,
By ALBERT I. LOEB,
Its Attorney,
Petitioner.

State of California,
City and County of San Francisco,—ss.

Albert I. Loeb, being first duly sworn, deposes and says: That he is the attorney of the defendant in the above-entitled cause and of the petitioner named in the foregoing petition; that he has read the same and believes the same is true, and affiant further says that said petitioner is absent from and is a nonresident of the County of Alameda, State of California, in which said suit is brought, and that affiant makes this affidavit for the reason that the defendant is absent from and is a nonresident of the said County of Alameda, State of California, in which said suit is brought.

ALBERT I. LOEB.

Subscribed and sworn to before me this 13th day of November, 1923.

[Seal] EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 14, 1923. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy Clerk.

Copy received, Nov. 13, 1923.

R. C. OGDEN,
Attorney for Pltf. [33]

In the Superior Court of the State of California in and for the County of Alameda.

No. 74,498—Dept. ——.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

BOND FOR REMOVAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Wyatt Lumber Company, Ltd., a corporation, as principals and Jacob Klien and B. K. Loeb, as sureties, said sureties residents and property holders in the City and County of San Francisco, State of California, are held and firmly bound unto Cooley Hardwood Manufacturing Co., a corporation, plaintiff in the above-entitled cause, its successors and assigns, in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors, and administrators, jointly and severally by these present.

The conditions of this obligation are such that:

WHEREAS, the said Wyatt Lumber Company, Ltd., a corporation, has applied by petition to the Superior Court of the State of California, in and

for the County of Alameda, for the removal of a certain *certain* cause therein pending, wherein Cooley Hardwood Manufacturing Co., a corporation, is plaintiff to the District Court, for the Southern Division, Northern District of California, for further proceeding on the grounds in the said petition set forth, and that all further proceedings in said action in said Superior Court be stayed. [34]

NOW, THEREFORE, if your petitioner, the said Wyatt Lumber Company, Ltd., a corporation, shall enter in said District Court, for the Southern Division, Northern District of California, aforesaid, on or before the first day of the next regular session, a copy of the records in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

WYATT LUMBER COMPANY, LTD. (Seal)
JACOB KLEIN. (Seal)
B. K. LOEB. (Seal)

Signed and delivered in the presence of
A. WRIGHT.

State of California,
City and County of San Francisco,—ss.

Jacob Klein and B. K. Loeb, the sureties named in the foregoing bond, being first duly sworn, each for himself, deposes and says as follows: I am the same person whose name is subscribed to the fore-

going bond, and I state I am a property-holder and resident of the County and State aforesaid, and that I am worth the sum of Five Hundred ($500.00) Dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

JACOB KLEIN.
B. K. LOEB.

(Over)

Subscribed and sworn to before me this 13th day of November, 1923.

[Seal] EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 14, 1923. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy Clerk. [35]

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In the Superior Court of the State of California, in and for the County of Alameda.

No. 74,498—Dept. ——.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

## NOTICE OF MOTION FOR ORDER OF REMOVAL.

To R. Clarence Ogden, Attorney for Plaintiff:

Please take notice that the defendant will on the 24th day of November, 1923, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the Court for an order removing said cause to the District Court, for the Southern Division, Northern District of California, in accordance with the petition of defendant, a copy of which is hereto attached.

Dated the 13th day of November, 1923.

ALBERT I. LOEB,
Attorney for Defendant. [36]

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In the Superior Court of the State of California, in and for the County of Alameda.

No. 74,498—Dept. ——.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

## ORDER OF REMOVAL.

This coming on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court, for the Southern Division, Northern District of California, and it appearing to the Court that the defendant has filed his petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned with good and sufficient sureties, as provided by law, and it appearing to the Court that this is a proper cause for removal to said United States District Court for the Southern Division, Northern District of California.

Now, therefore, it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court, for the Southern Division, Northern District of California, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open court this 24 day of November, 1923.

JOSEPH S. KOFORD,
Judge.

[Endorsed]: Filed Nov. 24, 1923. Geo. E. Gross, County Clerk. By Geo. H. Stricker, Deputy Clerk. [37]

In the Superior Court of the State of California, in and for the County of Alameda.

No. 74,498—Dept. No. 8.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

CLERK'S CERTIFICATE WITH RECORD ON REMOVAL.

State of California,
County of Alameda,—ss.

I, Geo. E. Gross, County Clerk of said County of Alameda, and *ex-officio* Clerk of the Superior Court in and for the said County of Alameda, hereby certify the above and foregoing to be a full, true, and correct copy of the record, and the whole thereof, in the above-entitled suit heretofore pending in said Superior Court, being the suit numbered No. 74,498, wherein Cooley Hardwood Manufacturing Co., a corporation, is plaintiff and Wyatt Lumber Company, Ltd., a corporation, is defendant, said record consisting of the complaint, filed by said plaintiff in said suit on the 5th day of September, 1923; the summons issued thereon, on the 5th day of September, 1923, affidavit of attachment filed September 7, 1923; order for publication of sum-

mons filed September 7, 1923; affidavit for publication of summons, filed September 7, 1923; writ of attachment filed September 26, 1923; demurrer to complaint filed November 14, 1923; petition for removal of suit to the United States District Court, for the Southern Division, Northern District of California, filed on the 14th day of November, 1923; bond for removal filed November 14, 1923; notice of motion for order of removal and copy of petition for removal filed November 14, 1923, and [38] order of removal, filed November 24, 1923; as the same appears on record and on file in my office.

I further certify that the register of actions entries in this action show that writs of attachment were issued to Kern, Los Angeles, Tulare, Fresno, Madera, San Joaquin, Alameda, Stanislaus, Merced and Contra Costa Counties and that a return has not been made from any of said counties at this date.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the Superior Court of the State of California, in and for the County of Alameda, this 27th day of November, 1923.

[Seal]

GEO. E. GROSS,
County Clerk.
By M. Beechrock,
Deputy.

Number 16,985. Clerk's Certificate With Record. Filed Nov. 28, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

At a stated term, to wit, the November term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 4th day of February, in the year of our Lord one thousand nine hundred and 24. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,985.

COOLEY HARDWOOD MFG. CO.

vs.

WYATT LUMBER CO., LTD.

MINUTES OF COURT—FEBRUARY 4, 1924—ORDER OVERRULING DEMURRER.

Defendant's demurrer to complaint came on to be heard and after arguments being submitted, it was ordered that said demurrer be and is hereby overruled. [40]

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In the United States District Court for the Southern Division, Northern District of California.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

## ANSWER.

Now comes the defendant in the above-entitled action and for answer to the complaint on file herein:

I.

Answering plaintiff's alleged first cause of action:

1. Denies generally and specifically each and every allegation not herein specifically admitted, qualified or denied.

2. Admits that plaintiff is a corporation existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Oakland, County of Alameda, State of California.

3. Admits that defendant is a corporation existing under and by virtue of the laws of the State of Louisiana, with its principal place of business at Ruston, Louisiana.

4. Admits that R. H. Cooley was, during all the times in said complaint mentioned, and now is an individual doing business in the City of Oakland, County of Alameda, State of California, under the fictitious name of R. H. Cooley Manufacturing Company, and that certificate whereof is on file in the office of the County Clerk, together with affidavit of publication of said certificate as provided by law. [41]

5. Denies that R. H. Cooley doing business under said fictitious name or otherwise or at all or said plaintiff and the defendant entered into a or any contract for the delivery of lumber in the City of

Oakland, State of California, or elsewhere as set forth in paragraph V of plaintiff's complaint upon the date and/or dates therein mentioned or at any other time or at all, and defendant avers the fact to be that the alleged correspondence set forth in said paragraph V of said complaint which plaintiff alleges, characterizes and avers to be the contract does not contain all the correspondence and wires passing between said R. H. Cooley and/or R. H. Cooley Manufacturing Company and defendant, and defendant avers the fact to be that plaintiff omitted from said complaint and from said paragraph V of plaintiff's alleged first cause of action thereof and from what plaintiff states and alleges to be the alleged contract, the following wires of June 6th, 1922, and June 8th, 1922, and the letters of June 8th, July 2, 1922, July 14, 1922, July 14, 1922, July 28, 1922, and July 28, 1922, respectively, which said defendant alleges are and were and would be a part of any contract sought to be alleged in paragraph V of plaintiff's alleged first cause of action, and the letters and wires therein set forth and herein set forth only when read together and as an entirety and not separately, constitute the Contract and arrangement, and the only contract and arrangement entered into by defendant and R. H. Cooley, doing business as R. H. Cooley Manufacturing Company and was entered into by and between defendant and R. H. Cooley doing business as R. H. Cooley Manufacturing Company, to manufacture certain stock at the Gandy, Louisiana, plant of defendant which said letters and wires

so omitted in said complaint are hereinafter set forth and are in words and figures as follows, to wit: [42]

"Oakland, Calif., June 6, 1922.

Wyatt Lumber Co.

Ruston, La.

Wire price F O B Oakland and F A S New Orleans sixty thousand on common and select and twenty thousand two common five quarter plain white oak per month to be sawn and shipped four months old. Quote and give quantity Can ship meantime either five quarter or inch Will contract for six months.

R. H. COOLEY MFG. CO.

802 A June 7."

"Ruston, Louisiana, June 8th, 1922.

R. H. Cooley Mfg. Co.

Oakland, Calif.

Your wire sixth will furnish five quarter plain white oak common and selects all rail ninety one number two common sixty six delivered or New Orleans ship side common and select sixty four number two common thirty nine to be shipped after four months on sticks from our own plant can furnish five cars inch common and selects eighty five number two common sixty four and begin shipping thirty days.

WYATT LUMBER COMPANY, LTD.

Day Letter."

"Ruston, Louisiana, June 8th, 1922.

R. H. Cooley Mfg. Co.,
Oakland, Calif.

Gentlemen:

We received your wire of the sixth instant. However, was not answered due to the fact the writer was out of the office and have wired you a day letter today naming prices on 5/4 #1 Common Select and #2 Common Plain White Oak. Also on five cars 4/4 #1 Common Plain White Oak and shipment can be made beginning thirty days from this date.

In the event we get the order we expect to manufacture this stock ourselves on our Gandy, Louisiana plant and the White Oak produced at this plant is of good texture, runs to fair widths and good lengths and of course, knowing that you used some of our stock a few years ago which you bought from Klopstock Brothers, and mentioning this fact which is to advise that the stock we are producing at this time is of the same texture and quality as the stock you used from Klopstock.

We have been very successful placing our stock in the Coast as we have never had any serious trouble in grades, measurement and texture of the stock. Therefore, hope that prices name will secure the business for us, in which event assure you that we will give you lumber nicely manufactured, up to grade, etc.

Hoping to be favored with a prompt response, we beg with best wishes, to remain,

Yours very truly,
WYATT LUMBER CO., LTD." [43]

"Ruston, La., July 2, 1922.

R. H. Cooley Mfg. Co.,
Oakland, Cal.

Gentlemen:

We wrote you on the 26th ult., answering your favor of the 20th and which had reference to 500,000′ 5/4 #1 and 2 Com. White Oak.

The mill producing this lumber also has about 200,000′ of excellent Red Oak. It occurred to the writer that you might be interested in this also providing we could cut the stock 5/4 thick. We will furnish this delivered Oakland #1 Com. & Selects $82.00 per Mft. the #2 Com. at $62.00 per Mft. This would be nice stock first class in every respect and inasmuch as we are cutting the 5/4 White Oak we would prefer cutting the 5/4 Read Oak also. Shipment of both Red and White Oak amounting to 80,000′ per month after being on sticks four months.

The writer figures that this will give you a first class lot of cheap lumber, running to good average widths and 50% or more 14 and 16′ long, and we hope on receipt of this letter you can see your way clear to include in the white oak order 175 to 200,000′ of the 5/4 Red Oak. With best wishes, we beg to remain,

Yours truly,
WYATT LUMBER CO.

WHP:LP."

Oakland, California, July 14, 1922.

Wyatt Lumber Co.,

Ruston, La.

Gentlemen:

In order that we can make proper provision for the kiln drying of the 500,000 feet of oak we have ordered from you, we would like to know what kind of oak it is you will ship us, whether highland, lowland or swamp oak.

Also, if you have any data on which to base an answer, we would like to know approximately what percentage of moisture it will contain at two months, three months, and four months on sticks.

We are considering the erection of a set of dry kilns and the size of the installation will depend on the kind of oak and the dryness of the stock when we receive it. We are very anxious to receive this oak as soon as possible and if the problem of drying it is not too difficult, we would rather take it not so dry than to wait a longer time for it to air dry.

Very truly yours,

R. H. COOLEY MFG. CO.

RHC/C." [44]

"Oakland, California, July 14, 1922.

Wyatt Lumber Co.,

Ruston, La.

Gentlemen:

On my return to town today I found your letter of July 2nd, waiting for me, so I wish to offer my apology for this delay.

We would not be able to use the Red Oak for the reason that it is very hard to sell Red Oak Flooring in this market. The only way it can be done is by offering it at $15.00 below White Oak Flooring. Your price on this lumber would not permit us to sell at so low a figure.

It would be far better for us to extend the order on White Oak than to try use Red Oak.

Hoping this delay has not caused you any trouble, we beg to remain,

Very truly yours,
R. H. COOLEY MFG. CO.

RHC/C."

"Ruston, Louisiana, July 28, 1922.

R. H. Cooley Mfg. Co.,
Oakland, California.

Gentlemen:

We received your favor of the 14th instant, which has reference to you using 5/4 Plain Red Oak in your Flooring business and your explanation is entirely satisfactory.

However, the writer feels that within the next few years this wood will necessarily enter into the Pacific Coast trade due to the fact that White Oak is becoming scarce the country over, and should you at any time in the future care to purchase any quantity of Red Oak would be glad to have the chance to quote you our closest prices.

With best wishes, beg to remain,

Yours very truly,
WYATT LUMBER COMPANY, LTD.

WHP.gln."

"Ruston, Louisiana, July 28th, 1922.

R. H. Cooley Mfg. Company,

Oakland, California.

Gentlemen:

We have your favor of the 14th instant which has reference to kiln drying the 500,000′ you have purchased of us, and acknowledgment herewith covering.

Please be advised that all of this [45] stock will be manufactured at our Gandy, Louisiana plant, and this lumber is going on sticks at this time and has been for the last several weeks.

Our own stock is upland oak. Therefore am sure that ninety days on sticks will be equal to four and one-half or five months in comparison with swamp oak so far as air dryness is concerned, and if you install an up to date oak kiln, feel amply sure that you can use our stock after being on sticks sixty days, and will kiln dry perfectly satisfactorily.

Therefore the writer would suggest that you try a few days of this stock say sixty days to seventy days on sticks, and after trying same will demonstrate whether or not the stock will prove out satisfactory as to dryness.

We will be in position to ship you sixty to eighty thousand feet per month and begin shipment within the next sixty days.

We thank you very much for this business, and as soon as this order is complete would be glad to

figure with you on another block for future delivery.

Yours very truly,

WYATT LUMBER COMPANY, LTD.

WHP/gln."

6. Answering paragraph VI of plaintiff's first cause of action, defendant has no information or belief sufficient to enable it to answer and therefore denies that on the 20th day of November, 1922, or at any other time or at all R. H. Cooley assigned to plaintiff the contract alleged in plaintiff's complaint or any other contract, and denies that after the 20th day of November, 1922, or upon any other date or at all defendant delivered to plaintiff at Oakland, California, or elsewhere the following amounts of lumber:

February, 1923—11.4 M feet #1 Common and Select and 3.066 M feet #2 Common.

March, 1923—15.032 M feet #1 Common and Select and 1.014 M feet #2 Common. [46]

and avers the fact to be that in the month of January, 1923, defendant shipped to R. H. Cooley Manufacturing Company two cars containing lumber of the above description, and defendant avers that in the making of said contract there was involved a relation of personal trust and personal confidence and a five days credit extended to R. H. Cooley the individual doing business as R. H. Cooley Manufacturing Company because of his character, credit and substance as follows: "This lumber to be paid for as follows: After deducting freight the balance of invoice to be discounted 2% within five days of arrival of each car," and defendant avers that de-

fendant never agreed to or consented to said alleged assignment of said alleged contract by R. H. Cooley or R. H. Cooley Manufacturing Company to plaintiff, Cooley Hardwood Manufacturing Company, a corporation, or the substitution of the plaintiff herein for the R. H. Cooley Manufacturing Company as a party to said alleged contract, and defendant further avers the fact to be that on or about September 13, 1922, R. H. Cooley Manufacturing Company advised defendant that it had arranged with the Richards Hardwood Lumber Company of San Francisco, "to handle the purchase of this lumber for us," and also that "they will settle with you (defendant) in accordance with our (R. H. Cooley Mfg. Co.) agreement with you," and that on or about October 11, 1922, the Richards Hardwood Lumber Company wrote to defendant as follows: [47]

"San Francisco, Oct. 11, 1922.

Wyatt Lumber Co.,

Ruston, La.

Gentlemen:

You have doubtless received word from the R. H. Cooley Mfg. Co., Oakland, Calif., relative to a contract which this firm has with you for some 500,000 feet White Oak Lumber, same to be dried and shipped so that they would receive about 60,000 feet per month. We understand that these people have wired you for a couple of cars to be shipped by Rail as they are in a hurry for about 40,000 ft.

You will please consign these cars to the Richards Hardwood Lumber Co., Oakland, Calif., notify

Richards Hardwood Lumber Co., San Francisco, California, invoicing same to our account at the regular terms, also any further shipments by water. We are taking over the account of the R. H. Cooley Mfg. Co., and any shipments made in behalf of this concern's contract with you, we will be responsible for.

Trusting you will give this matter your prompt attention, we are, Gentlemen,

Yours very truly,

RICHARDS HARDWOOD LUMBER CO.

FR/AK."

And defendant thereafter replied thereto as follows:

"Ruston, Louisiana, October 17th, 1922.

Richards Hardwood Lumber Co.,

San Francisco, Calif.

Gentlemen:

We are in receipt of your favor of the 11th inst. relative to contract with R. H. Cooley Mfg. Co. for 500,000 feet of white oak lumber. We note you want these cars consigned to Richards Hardwood Lumber Co., Oakland, Calif., notifying same at San Francisco, Calif., which is agreeable to us.

With best wishes, we remain,

Yours very truly,

WYATT LUMBER COMPANY, LTD.

ELT'S." [48]

Defendant has no information or belief sufficient to enable it to answer and placing the denial on that ground, denies that after the month of

March, 1923, the market price of said lumber referred to in paragraph II of plaintiff's first cause of action or in said alleged contract increased to the sum of $98.00 f. o. b. Oakland for No. 1 Common and Select and $76.00 f. o. b. Oakland for No. 2 Common.

7. Defendant denies that it did not intend to complete said alleged contract and has refused and now refuses to complete the performance of said alleged contract and has failed and refused and still fails and refuses to deliver said balance of lumber, but avers the fact to be that after the alleged date of the alleged order and alleged contract alleged in said complaint and before any alleged breach thereof, to wit, in March, 1923, it was agreed by and between R. H. Cooley, R. H. Cooley Manufacturing Company, and the plaintiff and defendant that the said order and/or/contract would be waived, abandoned and rescinded and settled; and R. H. Cooley, plaintiff and defendant, then waived, abandoned, and rescinded and settled the same accordingly, and defendant avers that even after the said agreement was entered into and said alleged contract waived, abandoned, rescinded and settled, defendant offered on June 26, 1923, to deliver lumber of the character called for by said alleged contract at the price that the alleged contract carried, shipping two cars per month, and defendant further avers the fact to be that on June 8, 1922, R. H. Cooley Manufacturing Company was advised by defendant that in the event the defendant would enter into the proposed contract as alleged or other-

wise that defendant expected to manufacture the stock at its Gandy, Louisiana, [49] plant and defendant avers at that time and at all times in said complaint set forth both R. H. Cooley Manufacturing Company, R. H. Cooley and plaintiff well knew and it was always and at all times understood that the operation of defendant at Gandy, Louisiana, consists of and is taking the trees from the forest, transporting them to the mill and cutting them into timber and that there could and might arise conditions such as car shortages, factory troubles, strikes and weather conditions, delays and other causes beyond the control of the defendant, which would delay, postpone, prevent and excuse the performance of the alleged or any other contract for the taking of the trees from said forest transporting them to the mill and cutting and/or manufacturing them into lumber and transporting them, and defendant further alleges that during the times mentioned in plaintiff's complaint there were weather conditions, car shortage and factory troubles beyond the control of the defendant and there were railroad shopmen's and other strikes and delays and other causes beyond the control of the defendant, which prevented defendant from getting cars and postponed, delayed, prevented and excused defendant from taking the trees from the forest, transporting them to the mill and cutting them into lumber, and delivering lumber alleged to have been ordered under any alleged order or alleged contract as alleged in plaintiff's com-

plaint or otherwise during the times mentioned in said complaint, and defendant denies that as alleged in said complaint or for any other reason or at all plaintiff was damaged in the sum of $5,-633.85, or any other sum or at all or in any other manner or at all.

8. For a separate and further defense to plaintiff's alleged first cause of action defendant alleges: [50]

That, to wit, in March, 1923, after the alleged date of the order and alleged contract alleged in said complaint, and before any alleged breach thereof, it was agreed by and between R. H. Cooley, R. H. Cooley Manufacturing Company, plaintiff and defendant that the said order and/or contract would be waived, abandoned and rescinded; and plaintiff, R. H. Cooley, R. H. Cooley Manufacturing Company and defendant then waived, abandoned, and rescinded the same accordingly.

9. For a separate and further defense to plaintiff's alleged first cause of action, defendant alleges the fact to be that on June 8th, 1923, R. H. Cooley Manufacturing Company was advised by defendant that in the event the defendant would enter into the proposed contract as alleged or otherwise that defendant expected to manufacture the stock at its Gandy, Louisiana, plant and defendant avers at that time and at all times in said complaint set forth R. H. Cooley Manufacturing Company, R. H. Cooley and plaintiff well knew and it was always and at all times understood that the operation of defendant at Gandy, Louisiana,

consists of and is taking the trees from the forest, transporting them to the mill and cutting them into timber and that there could and might arise conditions such as car shortages, factory troubles, strikes and weather conditions, delays and other causes beyond the control of the defendant, which would delay, postpone and prevent and excuse the performance of the alleged or any other contract for the taking of the trees from said forest, transporting them to the mill and cutting and/or manufacturing them into lumber and transporting them, and defendant further alleges that during the times mentioned in plaintiff's [51] complaint there were weather conditions, car shortages and factory troubles beyond the control of the defendant, and there were railroad, shopmen's and other strikes and delays and other causes beyond the control of the defendant, which prevented defendant from getting cars and postponed, delayed, prevented and excused defendant from taking the trees from the forest, transporting them to the mill and cutting them into lumber and delivering lumber alleged to have been ordered by plaintiff under any alleged order or alleged contract as alleged in plaintiff's complaint or otherwise during the times mentioned in said complaint.

10. For a separate and further defense, defendant alleges that there is and was at all times in said complaint mentioned, a well-known and well-defined custom and usage in the hardwood lumber trade, well known and understood by R. H. Cooley, the R. H. Cooley Manufacturing Company,

plaintiff and defendant existing and understood at all the times mentioned in said complaint and entering into and a part of by implication into all contracts, that all postponements and delays, in taking trees from the forest, transporting them to the mill and cutting them into timber and in manufacturing and/or delivering should be excused, should such delays in taking trees from the forest, transporting them to the mill and cutting them into timber and in manufacturing and delivering, be caused by car shortages, factory troubles, strikes and adverse weather conditions, and/or delays caused by circumstances beyond the control of the contracting parties, and defendant avers that any delay in taking trees from the forest, transporting them to the mill and in cutting them into timber and in manufacturing and/or delivering of the lumber called for by said alleged contract was caused by car shortages, factory troubles, strikes and [52] adverse weather conditions all beyond the control of defendant and by circumstances beyond the control of the defendant and that the alleged failure to take trees from the forest, transporting them to the mill and in cutting them into lumber and in manufacturing and/or delivery and the alleged breach of contract and alleged failure of performance of the alleged contract as alleged in said complaint are and were excused by such custom and usage so and always obtaining as aforesaid.

II.

Answering plaintiff's alleged second cause of action:

1. Denies generally and specifically each and every allegation not herein specifically admitted, qualified or denied.

2. Admits that plaintiff is a corporation existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Oakland, County of Alameda, State of California.

3. Admits that defendant is a corporation existing under and by virtue of the laws of the State of California, with its principal place of business at Ruston, Louisiana.

4. Admits that R. H. Cooley was, during all the times in said complaint mentioned, and now is an individual doing business in the city of Oakland, county of Alameda, State of California, under the fictitious name of R. H. Cooley Manufacturing Company, and that the certificate whereof is on file in the office of the County Clerk, together with affidavit of publication of said certificate as provided by law.

5. Denies that R. H. Cooley, doing business under said fictitious name or otherwise or at all or said plaintiff and the defendant entered into a or any contract for the delivery of lumber in the [53] city of Oakland, State of California, or elsewhere as set forth in paragraph V of plaintiff's complaint upon the date and/or dates therein mentioned or at any other time or at all, and defendant

avers the fact to be that the alleged correspondence set forth in said paragraph V of said complaint, which plaintiff alleges, characterizes and avers to be the contract does not contain all the correspondence and wires passing between said R. H. Cooley and/or R. H. Cooley Manufacturing Company and defendant and defendant avers the fact to be that plaintiff omitted from said complaint and from said paragraph V of plaintiff's alleged second cause of action thereof and from what plaintiff states and alleges to be the alleged contract, the following wires of June 6th, 1922, and June 8th, 1922, and the letters of June 8th, July 2, 1922, July 14, 1922, July 14, 1922, July 28, 1922 and July 28, 1922, respectively, which said defendant alleges are and were and would be a part of any contract sought to be alleged in paragraph V of plaintiff's alleged second cause of action, and the letters and wires therein set forth and herein set forth only when read together and as an entirety and not separately, constitute the contract and arrangement, and the only contract and arrangement entered into by defendant and R. H. Cooley, doing business as R. H. Cooley Manufacturing Company and was entered into by and between defendant and R. H. Cooley doing business as R. H. Cooley Manufacturing Company, to manufacture certain stock at the Gandy, Louisiana plant of defendant, which said letters and wires so omitted in said complaint are hereinafter set forth and are in words and figures as follows, to wit:

"Oakland California, June 6, 1922.

"Wyatt Lumber Co.,

Ruston, La.

Wire price F O B Oakland and F A S New Orleans sixty thousand [54] on common and select and twenty thousand two common five quarter plain white oak per month to be sawn and shipped four months old quote and give quantity Can ship meantime either five quarter or inch Will contract for six months.

R. H. COOLEY MFG. CO.

802 A June 7."

"Ruston, Louisiana, June 8th, 1922.

R. H. Cooley Mfg. Co.,

Oakland, Calif.

Your wire sixth will furnish five quarter plain white oak common and selects all rail ninety one number two common sixty six delivered or New Orleans ship side common and select sixty four number two common thirty nine to be shipped after four months on sticks from our own plant can furnish five car inch common and selects eighty five number two common sixty four and begin shipping thirty days.

WYATT LUMBER COMPANY, LTD.

Day Letter."

"Ruston, Louisiana, June 8th, 1922.

R. H. Cooley Mfg. Co.,

Oakland, Calif.

Gentlemen:

We received your wire of the 6th instant. How-

ever, was not answered due to the fact the writer was out of the office and have wired you day letter to-day naming prices on 5/4 #1 Common Select and #2 Common Plain White Oak. Also on five cars 4/4 #1 Common Plain White Oak and shipment can be made beginning thirty days from this date.

In the event we get the order we expect to manufacture this stock ourselves on our Gandy, Louisiana plant and the White Oak produced at this plant is of good texture, runs to fair widths and goods lengths and of course, knowing that you used some of our stock a few years ago which you bought from Klopstock Brothers, and mentioning this fact which is to advise that the stock we are producing at this time is of the same texture and quality as the stock you used from Klopstock.

We have been very successful placing our stock in the Coast as we have never had any serious trouble in grades, measurement and texture of the stock. Therefore, hope that prices name will secure the business for us, in which event assure you that we will give you lumber nicely manufactured, up to grade, etc.

Hoping to be favored with a prompt response, we beg with best wishes, to remain,

Yours very truly,

WYATT LUMBER CO., LTD. [55]

"Ruston, La. July 2, 1922.

R. H. Cooley Mfg. Co.,
Oakland, Cal.

Gentlemen:

We wrote you on the 26th ult., answering your favor of the 20th and which had reference to 500,000′ 5/4 #1 and 2 Com. White Oak.

The mill producing this lumber also has about 200.000′ of excellent Red Oak. It occurred to the writer that you might be interested in this also, providing we could cut the stock 5/4 thick. We will furnish this delivered Oakland #1 Com. & Selects $82,00 per Mft. the #2 Com. at $62.00 per Mft. This would be nice stock, first-class in every respect and inasmuch as we are cutting the 5/4 White Oak we would prefer cutting the 5/4 Red Oak also. Shipment of both Red and White Oak amounting to 80,000′ per month after being on sticks four months.

The writer figures that this will give you a first-class lot of cheap lumber, running to good average widths and 50% or more 14 and 16′ long, and we hope on receipt of this letter you can see your way clear to include in the white oak order 175 to 200,000′ of the 5/4 Red Oak. With best wishes, we beg to remain,

Yours truly,
WYATT LUMBER CO.

WHP:LP."

Oakland, California, July 14, 1922.

Wyatt Lumber Co.,

Ruston, La.

Gentlemen:

In order that we can make proper provisions for the kiln drying of the 500,000 feet of Oak we have ordered from you, we would like to know what kind of oak it is you will ship us, whether highland, lowland or swamp oak.

Also, if you have any data on which to base an answer, we would like to know approximately what percentage of moisture it will contain at two months, three months, and four months on sticks.

We are considering the erection of a set of dry kilns and the size of the installation will depend on the kind of oak and the dryness of the stock when we receive it. We are very anxious to receive this oak as soon as possible and if the problem of drying it is not too difficult, we would rather take it not so dry than to wait a longer time for it to dry.

Very truly yours,

R. H. COOLEY MFG. CO

RHC/C." [56]

"Oakland, California, July 14, 1922.

Wyatt Lumber Co.,

Ruston, La.

Gentlemen:

On my return to town to-day I found your letter of July 2d, waiting for me, so I wish to offer my apology for this delay.

We would not be able to use the Red Oak for the reason that it is very hard to sell Red Oak Flooring in this market. The only way it can be done is by offering it at $15.00 below White Oak Flooring. Your price on this lumber would not permit us to sell at so low a figure.

It would be far better for us to extend the order on White Oak than to try use Red Oak.

Hoping this delay has not caused you any trouble, we beg to remain,

Very truly yours,

R. H. COOLEY MFG. CO.

RHC/C."

"Ruston, Louisiana, July 28, 1922.

R. H. Cooley Mfg. Co.,

Oakland, California.

Gentlemen:

We received your favor of the 14th instant, which has reference to you using 5/4 Plain Red Oak in your Flooring business and your explanation is entirely satisfactory.

However, the writer feels that within the next few years this wood will necessarily enter into the Pacific Coast trade due to the fact that White Oak is becoming scarce the country over, and should you at any time in the future care to purchase any quantity of Red Oak would be glad to have the chance to quote you our closest prices.

With best wishes, beg to remain,

Yours very truly,

WYATT LUMBER COMPANY, LTD.

WHP. Gln."

"Ruston, Louisiana, July 28, 1922.

R. H. Cooley Mfg. Company,
Oakland, California.

Gentlemen:

We have your favor of the 14th instant which has reference to Kiln drying the 500,000′ you have purchased of us, and acknowledgment herewith covering.

Please be advised that all of this stock will be manufactured at our Gandy, Louisiana [57] plant, and this lumber is going on sticks at this time and has been for the last several weeks.

Our own stock is upland oak. Therefore am sure that ninety days on sticks will be equal to four and one half or five months in comparison with swamp oak so far as air dryness is concerned, and if you install an up to date oak kiln, feel amply sure that you can use our stock after being on sticks sixty days, and will kiln dry perfectly satisfactorily.

Therefore the writer would suggest that you try a few days of this stock, say sixty days to seventy days on sticks, and after trying same will demonstrate whether or not the stock will prove out satisfactory as to dryness.

We will be in position to ship you sixty to eighty thousand feet per month and begin shipment within the next sixty days.

We thank you very much for this business, and as soon as this order is complete would be glad

to figure with you on another block for future delivery.

Yours very truly,
WYATT LUMBER COMPANY, LTD.
WHP/gln."

6. Answering paragraph VI of plaintiff's second cause of action, defendant has no information or belief sufficient to enable it to answer and therefore denies that on the 20th day of November, 1922, or at any other time or at all R. H. Cooley assigned to plaintiff the contract alleged in plaintiff's complaint or any other contract, and denies that after the 20th day of November, 1922, or upon any other date or at all defendant delivered to plaintiff at Oakland, California, or elsewhere the following amounts of lumber:

February, 1923—11.4 M feet #1 Common and Select and 3.066 M feet #2 Common.

March, 1923—15.032 M feet #1 Common and Select and 1.014 M feet #2 Common. [58]

and avers the fact to be that in the month of January, 1923, defendant shipped to R. H. Cooley Manufacturing Company two cars containing lumber of the above description, and defendant avers that in the making of said contract there was involved a relation of personal trust and personal confidence and a five days credit extended to R. H. Cooley the individual doing business as R. H. Cooley Manufacturing Company because of his character, credit and substance as follows: "This lumber to be paid for as follows: After deducting freight the balance of invoice to be discounted 2% within five days of

arrival of each car''; and defendant avers that defendant never agreed to or consented to said alleged assignment of said alleged contract by R. H. Cooley or R. H. Cooley Manufacturing Company to plaintiff, Cooley Hardwood Manufacturing Company, a corporation, or the substitution of the plaintiff herein for the R. H. Cooley Manufacturing Company as a party to said alleged contract, and defendant further avers the fact to be that on or about September 13, 1922, R. H. Cooley Manufacturing Company advised defendant that it had arranged with the Richards Hardwood Lumber Company of San Francisco, ''to handle the purchase of this lumber for us,'' and also that, ''they will settle with you (defendant) in accordance with our (R. H. Cooley Mfg. Co.) agreement with you,'' and that on or about October 11, 1922, the Richards Hardwood Lumber Company wrote to defendant as follows: [59]

''San Francisco, Oct. 11, 1922.

Wyatt Lumber Co.,
Ruston, La.

Gentlemen:

You have doubtless received word from the R. H. Cooley Mfg. Co., Oakland, Calif., relative to a contract which this firm has with you for some 500,000 feet White Oak Lumber, same to be dried and shipped so that they would receive about 60,000 feet per month. We understand that these people have wired you for a couple cars to be shipped by Rail as they are in a hurry for about 40,000 ft.

You will please consign these cars to the Richards

Hardwood Lumber Co., Oakland, Calif., notify Richards Hardwood Lumber Company, San Francisco, California, invoicing same to our account at the regular terms, also any further shipments by water.

We are taking over the account of the R. H. Cooley Mfg. Co., and any shipments made in behalf of this concern's contract with you, we will be responsible for.

Trusting you will give this matter your prompt attention, we are, Gentlemen,

Yours very truly,

RICHARDS HARDWOOD LUMBER CO.

FR/AK."

And defendant thereafter replied thereto as follows:

"Ruston, Louisiana, October 17th, 1922.

Richards Hardwood Lumber Co.,

San Francisco, Calif.

Gentlemen:

We are in receipt of your favor of the 11th inst. relative to contract with R. H. Cooley Mfg. Co. for 500,000 feet of white oak lumber. We note you want these cars consigned to Richards Hardwood Lumber Co., Oakland, Calif., notifying same at San Francisco, Calif., which is agreeable to us.

With best wishes, we remain,

Yours very truly,

WYATT LUMBER COMPANY, LTD.

ELT'S." [60]

Defendant has no information or belief sufficient to enable it to answer and placing the denial

on that ground, denies that after the month of March, 1923, the market price of said lumber referred to in paragraph II of plaintiff's second cause of action or in said alleged contract increased to the sum of $98 f. o. b. Oakland for No. 1 Common and Select and $76.00 f. o. b. Oakland for No. 2 Common.

7. Defendant denies that it did not intend to complete said alleged contract and has refused and now refuses to complete the performance of said alleged contract and has failed and refused and still fails and refuses to deliver said balance of lumber, but avers the fact to be that after the alleged date of the alleged order and alleged contract alleged in said complaint and before any alleged breach thereof, to wit, in March, 1923, it was agreed by and between R. H. Cooley, R. H. Cooley Manufacturing Company, and the plaintiff and defendant that the said order and/or contract would be waived, abandoned and rescinded and settled; and R. H. Cooley, plaintiff and defendant then waived, abandoned, and rescinded and settled the same accordingly, and defendant avers that even after the said agreement was entered into and said alleged contract waived, abandoned, rescinded and settled, defendant offered on June 26, 1923, to deliver lumber of the character called for by said alleged contract at the price that the alleged contract carried, shipping two cars per month, and defendant further avers the fact to be that on June 8, 1922, R. H. Cooley Manufacturing Company was advised by defendant that in the event the defendant would

enter into the proposed contract as alleged or otherwise that defendant expected to manufacture the stock at its Gandy, Louisiana plant and defendant avers at that time [61] and at all times in said complaint set forth both R. H. Cooley Manufacturing Company, R. H. Cooley and plaintiff well knew and it was always and at all times understood that the operation of defendant at Gandy, Louisiana, consists of and is taking the trees from the forest, transporting them to the mill and cutting them into timber and that there could and might arise conditions such as car shortages, factory troubles, strikes and weather conditions, delays and other causes beyond the control of the defendant, which would delay, postpone, prevent and excuse the performance of the alleged or any other contract for the taking of the trees from the forest, transporting them to the mill and cutting and/or manufacturing them into lumber and transporting them, and defendant further alleges that during the times mentioned in plaintiff's complaint there were weather conditions, car shortage and factory troubles beyond the control of the defendant and there were railroad, shopmen's and other strikes and delays and other causes beyond the control of the defendant, which prevented defendant from getting cars and postponed, delayed, prevented and excused defendant from taking the trees from the forest, transporting them to the mill and cutting them into lumber, and delivering lumber alleged to have been ordered under any alleged order or alleged contract as alleged in plaintiff's com-

plaint or otherwise during the times mentioned in said complaint, and defendant denies that as alleged in said complaint or for any other reason or at all plaintiff was damaged in the sum of $5,633.85 or any other sum or at all or in any other manner or at all.

8. For a separate and further defense to plaintiff's alleged second cause of action defendant alleges: [62]

That, to wit, in March, 1923, after the alleged date of the order and alleged contract alleged in said complaint, and before any alleged breach thereof, it was agreed by and between R. H. Cooley, R. H. Cooley Manufacturing Company, plaintiff and defendant that the said order and/or contract would be waived, abandoned and rescinded; and plaintiff, R. H. Cooley, R. H. Cooley Manufacturing Company and defendant then waived, abandoned, and rescinded the same accordingly.

9. For a separate and further defense to plaintiff's alleged second cause of action, defendant alleges the fact to be that on June 8th, 1923, R. H. Cooley Manufacturing Company was advised by defendant that in the event the defendant would enter into the proposed contract as alleged or otherwise, that defendant expected to manufacture the stock at its Gandy, Louisiana, plant and defendant avers at that time and at all times in said complaint set forth R. H. Cooley Manufacturing Company, R. H. Cooley and plaintiff well knew and it was always and at all times understood that the operation of defendant at Gandy, Louisiana,

consists of and is taking the trees from the forest, transporting them to the mill and cutting them into timber and that there could and might arise conditions such as car shortages, factory troubles, strikes and weather conditions, delays and other causes beyond the control of the defendant, which would delay, postpone and prevent and excuse the performance of the alleged or any other contract for the taking of the trees from said forest, transporting them to the mill and cutting and/or manufacturing them into lumber and transporting them, and defendant further alleges that during the times mentioned in plaintiff's [63] complaint there were weather conditions, car shortages, and factory troubles beyond the control of the defendant, and there were railroad, shopmen's and other strikes and delays and other causes beyond the control of the defendant, which prevented defendant from getting cars and postponed, delayed, prevented and excused defendant from taking the trees from the forest, transporting them to the mill and cutting them into lumber and delivering lumber alleged to have been ordered by plaintiff under any alleged order or alleged contract as alleged in plaintiff's complaint or otherwise during the times mentioned in said complaint.

10. For a separate and further defense, defendant alleges that there is and was at all times in said complaint mentioned, a well-known and well-defined custom and usage in the hardwood lumber trade, well known and understood by R. H. Cooley, the R. H. Cooley Manufacturing Company, plain-

tiff and defendant existing and understood at all the times mentioned in said complaint and entering into and a part of by implication into all contracts, that all postponements and delays, in taking trees from the forest, transporting them to the mill and cutting them into timber and in manufacturing and or delivering should be excused, should such delays in taking trees from the forest, transporting them to the mill and cutting them into timber and in manufacturing and delivering be caused by car shortages, factory troubles, strikes and adverse weather conditions, and/or delays caused by circumstances beyond the control of the contracting parties, and defendant avers that any delay in taking trees from the forest, transporting them to the mill and in cutting them into timber and in manufacturing and/or delivering of the lumber called for by said alleged contract was caused by car shortages, factory troubles, strikes and [64] adverse weather conditions all beyond the control of defendant and by circumstances beyond the control of the defendant and that the alleged failure to take trees from the forest, transporting them to the mill and in cutting them into lumber and in manufacturing and/or delivery and the alleged breach of contract and alleged failure of performance of the alleged contract as alleged in said complaint are and were excused by such custom and usage so and always obtaining as aforesaid.

10. Defendant has no information or belief sufficient to enable it to answer the same and placing

the denial on that ground denies that Plain White Oak is not manufactured in the thickness, to wit, 5/4 inch, called for in said alleged contract alleged in plaintiff's complaint, in sufficient quantities to be of use to the plaintiff, except by special order and request, and denies said alleged contract called for the manufacture of Plain White Oak in dimensions not ordinarily cut by manufacturers of Plain White Oak and in dimensions particularly suitable to the requirements of the plaintiff.

11. Defendant has no information or belief sufficient to enable it to answer the same and placing the denial on that ground denies that it required at least 150 days from the placing of order for the cutting of lumber to particular dimensions until said lumber so cut can be manufactured, cured and delivered in Oakland, California, and that the plaintiff was unable for said reason to procure lumber manufactured to the dimension in said complaint referred to, to replace the quantities alleged to be undelivered by said defendant for a period of five months from the date of the alleged refusal of said defendant to complete the alleged contract, and denies that all of said fact and facts [65] were known to said defendant at the time said defendant entered into said alleged contract and at all other times in said complaint mentioned.

12. Defendant has no information or belief sufficient to enable it to answer the same and placing the denial on that ground, denies, that the plaintiff can and has made $10.00 per thousand feet of lumber manufactured by manufacturing its product

out of lumber cut practically to the dimensions alleged to have been called for in said alleged contract over and above the profit it can or does make, out of lumber ordinarily carried in stock and procurable on the open market.

13. Defendant has no information or belief sufficient to enable it to answer the same and placing the denial on that ground denies, that the plaintiff is engaged in the business of manufacturing said lumber into oak flooring strips, and that the said business is the same business which said *R. H. Cooley* operating under the fictitious name of *R. H. Cooley Manufacturing Co.,* was engaged in at the time said contract was made, and that the difference in profit alleged in said complaint was and is the same difference in profit which would have accrued to said R. H. Cooley, plaintiff's alleged assignor, or anyone else, and denies that by reason of said defendant's alleged refusal to complete its contract the plaintiff was damaged in the sum of $10.00 for each 1,000 feet of lumber which defendant is alleged to have refused to deliver, to wit, the sum of $4,694.90, or in any other sum or at all, and

Defendant denies that as alleged in said complaint or for any other reason or at all plaintiff was damaged in the sum of $4,694.90, or any other sum or at all or in any other manner or at all, and [66]

Defendant denies that as alleged in said complaint or for any other reason or at all plaintiff

was damaged in the sum of $5,633.85 or any other sum or at all or in any other manner or at all.

WHEREFORE defendant prays judgment against plaintiff for its costs in this behalf expended.

ALBERT I. LOEB,
Attorney for Defendant.

State of Louisiana,
Parish of Lincoln,
City of Ruston,—ss.

E. L. Tuten, being first duly sworn, deposes and says as follows:

1. That I am an officer of the Wyatt Lumber Company, Lts., a corporation, the defendant above named, to wit, the Secretary thereof.

2. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge except as to those matters which are therein stated on information or belief, and as to those matters I believe it to be true.

E. L. TUTEN.

Subscribed and sworn to before me this 15th day of February, 1924.

[Seal] PAULINE GIVENS,
Notary Public. [67]

State of Louisiana,
Parish of Lincoln.

I, A. H. Newsom, Deputy Clerk of the 4th District Court, in and for the said Parish, which court is a Court of Record, having a seal, do hereby certify that Pauline Givens, by and before whom

the foregoing acknowledgment was taken, was at the time of taking the same, a notary public, authorized to act in said Parish, and was duly authorized by the laws of said State to take and certify acknowledgments or proofs of deeds of land in said State, and further that I am well acquainted with the handwriting of the said Pauline Givens, and that I verily believe that the signature to said certificate of acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 15th day of February, 1924.

[Seal] A. H. NEWSOM.

Deputy Clerk of the 4th District Court in and for Lincoln Parish, Louisiana.

[Endorsed]: Filed Mar. 1, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Copy received Feb. 29, 1924.

R. CLARENCE OGDEN,
Attorney for Plaintiff. [68]

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At a stated term, to wit, the March term, A. D. 1924, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 28th day of May, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 16,985.

COOLEY HARDWOOD MNFG. CO.

vs.

WYATT LUMBER CO., LTD.

MINUTES OF COURT—MAY 28, 1924—ORDER ALLOWING AMENDMENT TO COMPLAINT.

Upon motion of Mr. Ogden, it was ordered that the complaint be amended on its face by inserting the figures VI and VII after the figure V on line 28 page 8; to which ruling defendant excepted. [69]

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

VERDICT.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Three Thousand Six Hundred Forty-two

Dollars and 50/100 ($3,642.50) Dollars, under the first count, and in the sum of Nothing under second count.

HENRY E. ROBERTS,
Foreman.

[Endorsed]: Filed June 4, 1924. Walter B. Maling, Clerk. [70]

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In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial upon the 27th day of May, 1924, being a day in the March, 1924, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; R. Clarence Ogden and Walter E. Hettman, Esqrs., appearing as attorneys for plaintiff and A. I. Loeb, Esq.,

appearing as attorney for defendant; and the trial having been proceeded with on the 28th, 29th days of May, and on the 3d and 4th days of June, in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Three Thousand Six Hundred Forty-two Dollars and 50/100 ($3,642.50) Dollars, under the first count, and in the sum of nothing in the second count. Henry E. Roberts, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the [71] premises aforesaid, it is considered by the Court that Cooley Hardwood Manufacturing Co., a corporation, plaintiff, do have and recover of and from Wyatt Lumber Company, Ltd., a corporation defendant, the sum of Three Thousand Six Hundred Forty-two and 50/100 ($3,642.50) Dollars, together with its costs herein expended taxed at $207.06.

Judgment entered June 4, 1924.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed June 4, 1924. Walter B. Maling, Clerk. [72]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation.

CLERK'S CERTIFICATE TO JUDGMENT-ROLL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 4th day of June, 1924.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

No. 16,985. Cooley Hardwood Mfg. Co. vs. Wyatt Lumber Co., Ltd., a Corp. Judgment-roll. Filed June 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Recorded Judgment Register No. 15, page 44. [73]

In the United States District Court for the Southern Division, Northern District of California, Division Two.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

ORDER EXTENDING TIME AND TERM OF COURT.

Good cause appearing therefor, it is hereby ordered that any bill of exceptions to be prepared by the defendant herein may be proposed, served and filed either in the present term of this Court or in the July term thereof and time therefor extended therefor accordingly.

Jun. 16, 1924.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed June 19, 1924. Walter B. Maling, Clerk. [74]

In the United States District Court for the Southern Division, Northern District of California, Division Two.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

## ASSIGNMENT OF ERRORS.

Wyatt Lumber Company, Ltd. (a corporation), defendant in this action, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignment of errors which it avers were committed by the Court in the proceedings and judgment against the defendant appearing on the record herein, that is to say:

I.

That the Court erred in holding and deciding that the complaint and/or the or any amended complaint filed herein by the plaintiff herein does state facts sufficient to constitute a cause of action against the defendant.

II.

That the Court erred in making the order of February 4, 1924, overruling the demurrer herein

filed to the complaint of the plaintiff and overruling said demurrer.

III.

That the Court erred in making the order of February 4, 1924, in overruling the demurrer of the defendant herein filed to the first cause of action of plaintiff's complaint.

IV.

That the Court erred in entering judgment and in ordering the entry of judgment in the above-entitled action for the reason that neither the original complaint nor any amended complaint herein filed does state facts sufficient to constitute a cause of action against the defendant nor do said complaints or either of them state facts sufficient to support a judgment herein in favor of plaintiff.

ALBERT I. LOEB,
Attorney for Deft.

[Endorsed]: Filed Aug. 2, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [75]

In the United States District Court for the Southern Division, Northern District of California, Division Two.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

## PETITION FOR WRIT OF ERROR.

Comes now the defendant herein, Wyatt Lumber Company, Ltd., by its attorney, Albert I. Loeb, and says that on the fourth day of June, 1924, this Court entered judgment herein in favor of plaintiff for $3,642.50, and $207.06 costs; in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of defendant, all of which will more in detail appear from the assignment of errors which this defendant files with this petition.

WHEREFORE, this defendant prays that a writ of error may be issued in its behalf out of the United States Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the judgment-roll, a transcript of the record, proceedings and papers with the exception of the testimony taken in this case

duly authenticated may be sent to the said Circuit Court of Appeals for said Circuit.

ALBERT I. LOEB,
Attorney for Defendant.

[Endorsed]: Filed Aug. 2, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [76]

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In the United States District Court for the Southern Division, Northern District of California, Division Two.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER CO., LTD., a Corporation, ration,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

The petition of Wyatt Lumber Company, Ltd., the above-named defendant, for writ of error in the above-entitled action to the United States Circuit Court of Appeals for the Ninth Circuit coming on to be heard, the said defendant being represented by its attorney, Albert I. Loeb, Esq., and it appearing to the Court that said petition should be granted and that a transcript of the record and proceedings in the above-entitled case upon the judgment herein

rendered, duly authenticated, with the exception of the testimony taken therein, together with the original assignment of errors, writ of error and citation, should be sent to the United States Circuit Court of Appeals for the Ninth Circuit as prayed, in order that such proceedings may be had as may be just to correct any manifest errors:

NOW, THEREFORE, IT IS ORDERED that a writ of error be and the same is hereby allowed herein, and that the said writ of error issue out of and under the seal of the above-entitled Court by the Clerk thereof upon bond being furnished by said Wyatt Lumber Company, Ltd., conditioned according to law, in the sum of $250.00 Dollars, and an additional supersedeas bond in the [77] sum of $5,000 and the appeal shall operate as a supersedeas upon petitioner filing such bond with sufficient securities to be conditioned as required by law; that a true copy of the record proceedings and papers upon which the judgment was rendered, with the exception of the testimony taken therein, together with the assignment of errors, writ of error and citation, duly certified according to law, shall be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in order that said Court may inspect the same and take such action therein as it deems proper according to law and justice.

Dated August 2, 1924.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed August 2, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [78]

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Premium Charged for This Bond is $60.00 for the Return Thereof.

In the United States District Court for the Southern Division, Northern District of California, Division Two.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

UNDERTAKING ON APPEAL TO STAY EXECUTION.

WHEREAS, the Wyatt Lumber Company, Ltd. (a corporation), defendant in the above-entitled *action,* has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered against Wyatt Lumber Company, Ltd. (a corporation), defendant in the said action in the United States District Court for the Southern Division, Northern District of California, Division Two, in favor of the plaintiff in said action, on the 4th day of June, 1924, for Three

Thousand Six Hundred Forty-two and 50/100 ($3,642.50) Dollars, and Two Hundred and Seven and 06/100 ($207.06) Dollars costs of suit.

NOW, THEREFORE, in consideration of the premises, and of such appeal the undersigned does hereby undertake and promise, on the part of the appellant, that said appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof not exceeding Two Hundred and Fifty ($250.00) Dollars, to which amount it acknowledges itself justly bound.

AND WHEREAS, the appellant is desirous of staying the execution of the said judgment so appealed from, said obligor does further, in consideration thereof, and of the premises, undertake and promise, and does acknowledge itself justly bound in the further sum of Five Thousand ($5,000.00) Dollars, being the amount named in the order allowing writ of error, dated August 2, 1924, and filed in this court; that if the said judgment appealed from or any part thereof, be affirmed, or the appeal [79] be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Circuit Court of Appeals for the Ninth Circuit in the court from which the appeal is taken, judgment may be entered in said

action on motion of respondent and without notice to the undersigned surety in its favor against the said surety, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

Dated this 8th day of August, 1924.

INDEMNITY INSURANCE CO. OF NORTH AMERICA.

By R. S. PADEN,
Its Attorney-in-fact.

Approved the 8 day of August, 1924.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Aug. 8, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

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In the Southern Division of the United States District Court for the Northern District of California.

Clerk's Office.

No. 16,985.

COOLEY HARDWOOD MANUFACTURING CO., a Corporation,

Plaintiff,

vs.

WYATT LUMBER COMPANY, LTD., a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare Transcript on Writ of Error to contain following papers:

1. Judgment-roll.
2. Assignment of errors.
3. Petition for writ of error.
4. Order allowing writ of error.
5. Order extending time and term.
6. Citation on writ of error.
7. Writ of error.
8. Undertakings on appeal.
9. This praecipe.

ALBERT I. LOEB,

Attorney for Wyatt Lumber Company, Ltd., a Corporation.

[Endorsed]: Filed Sep. 11, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [81]

Copy received, Sep. 11, 1924.

R. CLARENCE OGDEN,

Atty. for Cooley Hardwood Mfg. Co.

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(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing eighty-

one pages, numbered from 1 to 81, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $33.50; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of September, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

By A. C. Aurich,
Deputy Clerk. [82]

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## WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Southern Division, Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Cooley Hardwood Manufacturing Co., a Corporation, Defendant in Error, a manifest

error hath happened, to the great damage of the said Wyatt Lumber Company, Ltd., plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within 30 days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 8th day of September, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

JOHN S. PARTRIDGE,
District Judge. [83]

[Endorsed]: No. 16,985. United States District Court for the Northern District of ———. Wyatt Lumber Co., Plaintiff in Error, vs. Cooley Hardwood Mfg. Co., Defendant in Error. Writ of Error. Filed Sep. 11, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.

Copy received Sep. 11, 1924.

R. CLARENCE OGDEN,
Atty. for Cooley Hardwood Mfg. Co.

RETURN TO WRIT OF ERROR.

The Answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

By A. C. Aurich,
Deputy Clerk. [84]

## CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Cooley Hardwood Manufacturnig Co., a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Southern Division, Northern District of California, wherein Wyatt Lumber Company, Ltd., plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge, for the Southern Division, Northern District of California, this 8th day of September, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge. [85]

[Endorsed]: No. 16,985. United States District Court for the Northern District of ———. Wyatt Lumber Co., Plaintiff in Error, vs. Cooley Hardwood Mfg. Co. Defendant in Error. Citation on Writ of

Error. Filed Sep. 11, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.

Copy received Sep. 11, 1924.

R. C. CLARENCE OGDEN,
Atty. for Cooley Hardwood Mfg. Co.

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[Endorsed]: No. 4353. United States Circuit Court of Appeals for the Ninth Circuit. Wyatt Lumber Company, Ltd., a Corporation, Plaintiff in Error, vs. Cooley Hardwood Manufacturing Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed September 30, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4353

IN THE

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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WYATT LUMBER COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

COOLEY HARDWOOD MANUFACTURING COMPANY, a Corporation,

Defendant in Error.

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# OPENING BRIEF OF PLAINTIFF IN ERROR.

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ALBERT I. LOEB,
Attorney for Appellant and Defendant.

IN THE

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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WYATT LUMBER COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

COOLEY HARDWOOD MANUFACTURING COMPANY, a Corporation,

Defendant in Error.

## OPENING BRIEF OF PLAINTIFF IN ERROR.

May it Please the Court:

In this case before this Court a single question is involved. Does the complaint state facts sufficient to constitute a cause of action, and sufficient to support the judgment?

The complaint by the plaintiff, a corporation, alleges a contract by the Wyatt Lumber Co., Ltd., with one R. H. Cooley for the delivery of 500,000 feet of lumber. This contract as set up in the complaint provided for a five days credit to R. H. Cooley.

The plaintiff Cooley Hardwood Manufacturing Co., a corporation, in Paragraph VI of its complaint alleges:

1. That R. H. Cooley assigned to it the contract.

2. That plaintiff notified defendant of said assignment.

3. That thereafter defendant delivered to plaintiff approximately 30,000 feet of the lumber and no other lumber.

Plaintiff *does not allege* that the defendant *consented* to the assignment of said contract from R. H. Cooley to the plaintiff corporation.

In this connection we submit two propositions of law:

1. That a contract involving personal trust and confidence is not assignable by one party to it without the consent of the other party.

Arkansas Smelting Co. vs. Belding, 127 U. S. 5, C. T. 880, 379.

Demerest vs. Dunton Lumber Co., 161 Federal Rep. 264, in which it is said:

"While the authorities do not differ as to the principle that a contract personal in its nature cannot be assigned by one party without the consent of the other, they differ in the application of the principle; the question in each case being whether the contract is personal or not. The law on the subject for the Federal Courts has been laid down by the Supreme Court in Arkansas Smelting Company vs. Belding Mining Company, 127 U. S. 397 and 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, in which Mr. Justice Gray said:

"'At the present day, no doubt, an agreement to pay money or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' Humble vs. Hunter, 12 Q. B. 310, 317; Winchester vs. Howard, 96 Mass. 303, 305, 3 Am. Dec. 93; Boston Ice Co. vs. Potter, 123 Mass. 28, 25 Am. Rep. 9; King vs. Batterson, 13 R. I. 117, 120, 43 Am. Rep. 13; Lansden vs. McCarthy, 45 No. 106. The rule upon this subject as applicable to the case at bar, is well expressed in a recent English treatise; 'Rights arising out of contract cannot be transferred, if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts, 425."

2. A pleading is to be construed most strongly against the pleader.

21 Ruling Case Law, 464; 3 R. C. L. Supp. 1158.

We respectfully submit, therefore, that the complaint in this case does not state facts sufficient to support the judgment.

Respectfully submitted,

ALBERT I. LOEB,

Attorney for Appellant and Defendant.

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No. 4353

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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WYATT LUMBER COMPANY, LTD.,
(a corporation),
*Plaintiff in Error,*

vs.

COOLEY HARDWOOD MANUFACTURING
COMPANY (a corporation),
*Defendant in Error.*

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## BRIEF FOR DEFENDANT IN ERROR.

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R. CLARENCE OGDEN,
Standard Oil Building, San Francisco,
*Attorney for Defendant in Error.*

No. 4353

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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WYATT LUMBER COMPANY, LTD., (a corporation),
*Plaintiff in Error,*

vs.

COOLEY HARDWOOD MANUFACTURING COMPANY (a corporation),
*Defendant in Error.*

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## BRIEF FOR DEFENDANT IN ERROR.

May it please the court:

It is the contention of this defendant in error that the writ in this case was sued out solely for the purpose of delaying justice and without any foundation in law or in conscience.

Plaintiff in error has wholly failed to support the writ or to attempt so to do by any brief complying with Rule 24, page 22, "Rules of the United States Circuit Court of Appeals for the Ninth Circuit."

The only brief filed is one less than four pages in length in which:

(a) No "concise abstract, or statement of the case" is presented.

(b) No separate specification of the errors relied upon and no statement of exception relied upon.

(c) No references to the pages of the record relied upon.

The judgment attacked by plaintiff in error is one upon verdict rendered by a jury after evidence presented both by plaintiff and defendant. No record of that evidence has been brought before this court. It must, therefore, be here presumed that all issues raised by the complaint and answer were determined in favor of plaintiff and are supported by the evidence. Those issues are:

A. As raised by the complaint and denied in answer.

1. That plaintiff and defendant are corporations.

2. That in June and July, 1922, R. H. Cooley entered into a written contract with defendant whereunder defendant agreed to deliver 500,000 feet of oak lumber to said R. H. Cooley, of certain grades at $85.00 per thousand feet for one grade and $64.00 per thousand feet for the second grade. Prices F. O. B. Oakland. Price to be settled for less 2% five days after delivery. Deliveries to commence about November, 1922, and continue thereafter at rate of sixty thousand feet per month. (Trans. pages 1-11.)

3. That R. H. Cooley assigned that contract to this plaintiff in November, 1922, of which assignment defendant was notified, and after such notification defendant delivered to plaintiff some thirty thousand five hundred feet of lumber as an act of ratification.

4. That thereafter the market price of oak lumber increased thirteen dollars per thousand feet F. O. B. Oakland.

5. That thereafter defendant refused to complete and at all times thereafter refused and failed to complete the contract to the damage of plaintiff in the sum of $5633.85.

(Trans. pages 11 to 12.)

B. As raised by the answer.

"That in making of said contract there was involved a relation of personal trust and a five days credit extended to R. H. Cooley and that defendant never agreed to or consented to said alleged assignment of said contract to plaintiff." (Trans. pages 54 and 55.)

For plaintiff to contend at this stage of the proceedings that the complaint is fatally defective, we respectfully submit, is frivolous in the extreme. To so contend, without any reference to the allegation in the answer above mentioned, is indicative of a lack of good faith.

An omitted allegation in the complaint may be aided by an averment of that fact in the answer, so

as to uphold a judgment thereon, even though a demurrer to the complaint for want of the fact had been erroneously overruled.

Daggett v. Gray, 110 Cal. 169;
Savings Bank v. Barrett, 126 Cal. 413;
Kreling v. Kreling, 118 Cal. 413;
Shenck v. Hartford Ins. Co., 71 Cal. 28;
De Flores v. Santa Cruz, 86 Cal. 191;
Burns v. Cushing, 96 Cal. 669;
Girvin v. Simon, 116 Cal. 604;
Booth v. Oakland Bank, 122 Cal. 19;
Flynn v. Ferry, 127 Cal. 648, 653;
Perkins v. Blauth, 163 Cal. 782.

For instance, where a complaint in replevin failed to aver that plaintiff was the owner or entitled to possession at the time the action was commenced, such defect is cured by an averment in the answer denying that plaintiff was the owner and/or entitled to the possession.

Flynn v. Ferry, supra.

In the instant case, if the complaint is silent upon the issue that defendant consented to the assignment of the contract, that issue was raised by the answer and decided by the verdict in favor of plaintiff.

But the complaint is not so silent. It is alleged:

> "That thereafter, on the 20th day of November, 1922, said R. H. Cooley assigned to this plaintiff said contract, and thereafter this plaintiff notified said defendant of said assignment; that thereafter said defendant delivered to this plaintiff at Oakland, California, the fol-

> lowing amounts of lumber and no other amounts;" etc. (Trans. p. 11.)

Where facts are alleged from which the ultimate fact can be inferred, a general objection to the complaint will not lie.

Allan v. Guaranty Oil Co., 176 Cal. 421, 426.

In that case the complaint "did not set forth an actual eviction." * * * "But it did allege facts showing the equivalent of an eviction."

Allan v. Guaranty Oil Co., supra, p. 426.

The complaint now before this honorable court alleged facts equivalent to a consent by defendant to the assignment, to wit: partial performance to the assignee after notice of the assignment.

> "The acts and conduct of a party to a contract, with knowledge of the fact that the contract has been assigned, may be such as to warrant the conclusion that the provision against the assignment has been waived."
>
> 5 C. J., 884 § 49;
>
> Staples v. Somerville, 176 Mass. 237;
>
> Moore v. Thompson, 93 Mo. A. 336;
>
> Brewster v. Hornellsville, 54 N. Y. S. 904;
>
> Camp v. Wiggins, 72 Iowa 643;
>
> Cheney v. Bilby, 74 Fed. 52.

The real question to be considered, ordinarily, is whether the contract under consideration is such as to bring it within the rule that contracts are not assignable where they involve such a relation of personal trust as to make that relationship of the

essence thereof. Upon this question plaintiff in error is silent. Such pretense that it makes in support of the writ is based upon the broad statement of the general doctrine without any reference to authorities or quotations from the record indicating that the contract here involved is such a contract. At the trial, however, it was contended that such was the case and one of the issues tried was whether after knowledge of the assignment defendant and plaintiff in error consented thereto. The verdict rendered includes a finding that such consent was given. With the evidence supporting such a finding unquestioned, we submit, the time and patience of this honorable court has been frivolously trespassed upon for no other reason than that of delay.

That frivolity of purpose is to be clearly seen in the second and only other point raised by plaintiff in error, to wit:

> "A pleading is to be construed most strongly against the pleader."

After verdict the contrary is the rule:

> Bates v. Babcock, 95 Cal. 479, 21 R. C. L. 467.

The Code of Civil Procedure provides (section 452):

> "*Pleadings to be liberally construed.* In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

This is a common law action and

> "contrary to the common law rule, every reasonable intendment and presumption under the rule of liberal construction must be made in favor of the pleader."
>
> 21 R. C. L., 466;
>
> United States v. Parker, 120 U. S. 89.

Commenting on a similar code section in Nevada the Supreme Court of the United States said:

> "The result of the decisions in that State seems to be that on a general demurrer the allegations of a complaint will be construed as liberally in favor of the pleader as, before the Code, they would have been construed after verdict for the plaintiff."
>
> United States v. Parker, supra.

The writ of error in this case sued out was accompanied by a supersedeas bond theretofore filed, a copy of the writ was not filed with the clerk of the court, until after the time permitted by law for perfecting the supersedeas. By that delay in filing the writ, the cause was prevented from coming before this honorable court during the October term, a delay was obtained by preventing plaintiff from executing its judgment until the effect of the supersedeas could be determined.

It is respectfully submitted, therefore, that the judgment of the District Court be affirmed, that pursuant to Rule 30 of this court, damages in addi-

tion to interest be awarded, and that this defendant in error be allowed its costs herein incurred.

Dated, San Francisco,
March 14, 1925.

Respectfully submitted,
R. Clarence Ogden,
*Attorney for Defendant in Error.*

No. 4354

# United States Circuit Court of Appeals

## For the Ninth Circuit.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the United States District Court of the District of Oregon.**



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4354

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. CHARLES W. ROBISON, Astoria, Oregon, and Mr. E. M. MORTON, Yeon Building, Portland, Oregon,

For the Plaintiff in Error.

Mr. JOHN S. COKE, United States Attorney for the District of Oregon, and Mr. MILLAR E. McGILCHRIST, Assistant United States Attorney for the District of Oregon, Old Post-office Building, Portland, Oregon,

For the Defendant in Error.

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## CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Pasco Bakotich is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this 24th day of March, in the year of our Lord one thousand nine hundred and twenty-four.

CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due and timely service of the within citation on writ of error is hereby accepted this 24th day of March, 1924.

MILLAR E. McGILCHRIST,
Assistant United States Attorney,
Attorney for Defendant in Error.

[Endorsed]: No. C.—10471. 33–154. United States District Court, District of Oregon. Pasco Bakotich vs. The United States of America. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Mar. 24, 1924. G. H. Marsh, Clerk. [1*]

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In the United States Circuit Court of Appeals for the Ninth Circuit.

PASCO BAKOTICH,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

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*Page-number appearing at foot of page of original certified Transcript of Record.

## WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between United States of America, plaintiff and defendant in error, and Pasco Bakotich, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of

right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 24th day of March, 1924.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. Pasco Bakotich, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed March 24th, 1924. G. H. Marsh, Clerk United States District Court, District of Oregon. By ————, Chief Deputy Clerk. [2]

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In the District Court of the United States for the District of Oregon.

November Term, 1923.

BE IT REMEMBERED, That on the 21st day of November, 1923, there was duly filed in the District Court of the United States for the District of Oregon, an information, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

THE UNITED STATES

vs.

PASCO BAKOTICH.

INFORMATION.

Violating Sections 3 and 21, Title II, National Prohibition Act.

United States of America,
District of Oregon,—ss.

BE IT REMEMBERED, That J. O. Stearns, Jr., Assistant Attorney of the United States for the District of Oregon, who prosecutes in behalf and with the authority of the United States, comes here in person into court at this —— term thereof, and for the United States gives the Court to understand and be informed that one Pasco Bakotich, the defendant above named, on or about the 14th day of September, 1923, at Astoria, Clatsop County, in the State and District of Oregon, and within the jurisdiction of this court, did unlawfully, wilfully and knowingly have in his possession a quantity of intoxicating liquor, to wit: moonshine whisky, fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT TWO.

That Pasco Bakotich, the defendant above named, on or about the 14th day of September, 1923, at Astoria, Clatsop County, in the State and District of Oregon, and within the jurisdiction of this court, did unlawfully, wilfully and knowingly sell a quantity of intoxicating liquor, to wit, moonshine whisky, fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE.

That Pasco Bakotich, the defendant above named on or about the 14th day of September, 1923, at Astoria, Clatsop County, in the State and District of Oregon, and within the jurisdiction of this court, did wilfully, unlawfully and knowingly maintain a common nuisance within the meaning of the National Prohibition Act, to wit, that building and place of business known as #83 7th Street, Astoria, Oregon, wherein intoxicating liquor, fit for beverage purposes, was then and there manufactured, kept and sold in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WHEREUPON, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due

process of law may be awarded against the said Pasco Bakotich, defendant, in this behalf to make his answer to the United States touching and concerning the premises.

Dated at Portland, Oregon, this —— day of November, A. D. 1923.

J. O. STEARNS, Jr.,
Asst. United States Attorney for the District of Oregon.

United States of America,
District of Oregon,—ss.

I, J. O. Stearns, Jr., United States Attorney for the District of Oregon, being sworn, do say, that the foregoing information is true as I verily believe.

J. O. STEARNS, Jr.

Subscribed and sworn to before me this 21st day of November, A. D. 1923.

G. H. MARSH,
Clerk of the District Court of the United States, for the District of Oregon.

By E. M. Morton,
Deputy.

[Endorsed]: B. W. $1000 Bail. No. C.—10471. U. S. District Court, District of Oregon. The United States vs. Pasco Bakotich. Information for Violating Sections 3 and 21, Title II, National Prohibition Act. Filed November 21, 1923. G. H. Marsh, Clerk. [4]

AND AFTERWARDS, to wit, on Saturday, the 12th day of January, 1924, the same being the 56th judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [4½]

In the District Court of the United States for the District of Oregon.

No. C.—10,471.

January 11, 1924.

Indictment—Sections 3 and 21, Title II, National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

PASCO BAKOTICH.

MINUTES OF COURT—JANUARY 12, 1924—ARRAIGNMENT AND PLEA.

Now, at this day, comes the plaintiff by Mr. Joseph O. Stearns, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. C. W. Robison, of counsel. Whereupon said defendant being duly arraigned upon the indictment herein for plea thereto says he is not guilty. Whereupon, on motion of plaintiff,

IT IS ORDERED that this cause be, and the same is hereby set for trial for Thursday, February 21, 1924. [4¾]

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AND AFTERWARDS, to wit, on the 20th day of February, 1924, there was duly filed in said court a verdict, in words and figures as follows, to wit: [5]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

PASCO BAKOTICH,

Defendant.

VERDICT.

We, the jury duly impaneled to try the above-entitled cause, do find the defendant Pasco Bakotich guilty as charged in Count One of the information; guilty as charged in Count Two of the information; and guilty as charged in Count Three of the information herein.

Dated at Portland, Oregon, this 20th day of February, 1924.

J. W. PERIGO,
Foreman.

Filed February 20, 1924. G. H. Marsh, Clerk. [6]

AND AFTERWARDS, to wit, on the 26th day of February, 1924, there was duly filed in said court a motion for a new trial, in words and figures as follows, to wit: [7]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

PASCO BAKOTICH,

Defendant.

MOTION FOR A NEW TRIAL.

Comes now the defendant herein and moves the Court to grant him a new trial for the following reasons, to wit:

I.

That the verdict of the jury is contrary to the law and the evidence.

II.

Because the Court erred in refusing to give the written instructions as requested by the defendant in relation to the matter of entrapment.

III.

Because the Court erred in giving the instructions in the words of the Court in relation to decoy letters and in relation to entrapment.

IV.

Because the Court erred in instructing the jury

in relation to the matter of the defendant proving his innocence in the above-entitled cause.

C. W. ROBISON,
Attorney for the Defendant.

State of Oregon,
County of Clatsop,—ss.

Due service of the within motion for new trial is hereby accepted in Multnomah County, Oregon, this —— day of February, 1924, by receiving a copy thereof, duly certified to as such by C. W. Robison, one of the attorneys for defendant.

MILLAR E. McGILCHRIST,
Asst. U. S. Atty.,
Attorney for Plaintiff.

Filed February 26, 1924. G. H. Marsh, Clerk. [8]

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AND AFTERWARDS, to wit, on Monday, the 10th day of March, 1924, the same being the 7th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [9]

In the District Court of the United States for the District of Oregon.

No. C.—10,471.

March 10, 1924.

Indictment—Sections 3 and 21, Title II, National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

PASCO BAKOTICH.

MINUTES OF COURT—MARCH 10, 1924—ORDER DENYING MOTION FOR NEW TRIAL.

Now at this day this cause comes on to be heard by the Court upon the motion of defendant for a new trial herein, and was argued in open court by Mr. Millar E. McGilchrist, Assistant United States Attorney. And the Court, having heard the argument of plaintiff, and having considered the written argument of Mr. Charles W. Robison, of counsel for defendant,—

IT IS ORDERED that said motion be and the same is hereby denied. [10]

AND AFTERWARDS, to wit, on Saturday, the 15th day of March, 1924, the same being the 12th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [11]

In the District Court of the United States for the District of Oregon.

No. C.—10,471.

March 15, 1924.

Indictment—Sections 3 and 21, Title 2, National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

PASCO BAKOTICH.

MINUTES OF COURT—MARCH 15, 1924—SENTENCE.

Now at this day come the plaintiff by Mr. Millar E. McGilchrist, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Charles W. Robison, of counsel. Whereupon this being the time set for the sentence of said defendant upon the verdict heretofore returned by the jury herein,

IT IS ADJUDGED that said defendant do pay a fine of $250.00 and that he be imprisoned in the

County Jail of Multnomah County, Oregon, for the term of nine months, and that he stand committed until this sentence be performed or until he be discharged according to law. Whereupon on motion of said defendant,

IT IS ORDERED that he be and he is hereby allowed a ten days' stay of commitment herein to perfect his appeal. Whereupon on motion of plaintiff

IT IS FURTHER ORDERED that the amount of the supersedeas bond of said defendant be and is hereby fixed in the sum of $2,500.00 [12]

---

AND AFTERWARDS, to wit, on the 24th day of March, 1924, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [13]

In the United States Circuit Court of Appeals for the Ninth Circuit.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the Above-entitled Court:

Your petitioner, Pasco Bakotich, defendant in the above-entitled cause, now comes and brings

this, his petition, as plaintiff in error, for a writ of error to the District Court of the United States for the District of Oregon and shows;

That on the 15th day of March, 1924, there was rendered and entered in the above-entitled cause a judgment in and by the said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the County Jail of Multnomah County, Oregon, for a term of nine months and to pay a fine of two hundred fifty dollars ($250.00) and to stand committed until said sentence be performed or until he be discharged according to law.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the records and proceedings at and in said cause, in the rendition of said judgment and sentence greatly to the damage of your petitioner, all of which errors will be made to appear by an examination of the record in said cause and by the bill of exceptions tendered and filed herein by your petitioner and in the assignments of error filed herewith.

To the end, therefore, that the said judgment and sentence and proceedings in said cause may be reversed by the [14] United States Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued directed therefrom to the District Court of the United States for the District of Oregon, returnable according to law and the practice and rules of this court, and that there may be directed to be

returned, pursuant thereto, a true copy of the record, bill of exceptions, assignments of error, and all relevant proceedings had in said cause, that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any there be, may be fully corrected and full and speedy justice done your petitioner. And your petitioner now makes and files herewith his assignments of error upon which he will rely and which will be made to appear by the return of said record in obedience to said writ.

WHEREFORE your petitioner prays the issuance of a writ of error as hereinbefore set forth and prays that his assignments of error, filed herewith, be considered as his assignments of error upon said writ and that the judgment entered in this cause be reversed and held for naught and said cause remanded for further proceedings and that an order be made fixing the amount of security which said petitioner shall furnish upon said writ of error and that upon the giving of such security all proceedings in the District Court of the United States for the District of Oregon be suspended and stayed until the determination of said writ of error.

C. W. ROBISON,
E. M. MORTON,
Attorneys for Plaintiff in Error.

Service accepted this 24th day of March, 1924.

MILLAR E. McGILCHRIST,
Assistant United States Attorney,
Attorney for Plaintiff.

Filed March 24, 1924. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 24th day of March, 1924, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [16]

In the United States Circuit Court of Appeals for the Ninth Circuit.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

ASSIGNMENTS OF ERROR.

Comes now the plaintiff in error above named and presents this his assignments of error upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause:

I.

That the trial Court erred in refusing to give the jury the following instruction requested by the defendant:

"The Court instructs the jury that in cases where criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the state used decoys or untruthful statements to furnish opportunity for or to aid the accused in the commis-

sion of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that officers of the Government or of the city incited and by persuasion and misrepresentation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the sale of the said intoxicating liquor to the witness McGee." Defendant's Requested Instruction No. I.

II.

That the trial Court erred in refusing to give the jury the following instruction requested by the defendant:

"The Court instructs the jury that where the criminal intent originates in the mind of the entrapped person, and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be had though the criminality of the act is not affected by any question of consent, therefore if you find from the evidence in this case that the officer McGee or any officer of the State of Oregon or of the city of Astoria lured or induced the defendant Pasko Bakotich to commit the offense charged in order [17] to prosecute him therefor, then I instruct you that your

verdict should be not guilty." Defendant's Requested Instruction No. II.

III.

That the trial Court erred in failing to instruct the jury on the law of entrapment.

IV.

That the trial Court erred in denying the motion for a new trial herein, said motion being based upon the errors complained of in assignments I and II hereof.

C. W. ROBISON,
E. M. MORTON,
Attorneys for Plaintiff in Error.

State of Oregon,
County of Multnomah,—ss.

Service accepted and copy received this 24th day of March, 1924.

MILLAR E. McGILCHRIST,
Assistant United States Attorney,
Attorney for Defendant in Error.

Filed March 24, 1924. G. H. Marsh, Clerk. [18]

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AND AFTERWARDS, to wit, on Monday, the 24th day of March, 1924, the same being the 19th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [19]

In the United States Circuit Court of Appeals for the Ninth Circuit.

C.—10,471.

March 24, 1924.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

MINUTES OF COURT—MARCH 24, 1924—ORDER ALLOWING WRIT OF ERROR.

Upon reading and filing the petition of plaintiff in error above named for an order allowing him to procure a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Oregon, it appearing that said defendant has filed herein the assignments of error relied upon;

IT IS NOW THEREFORE HEREBY ORDERED that said petition be and the same is hereby allowed and that a writ of error issue as in said petition prayed for and that a citation be issued and served herein;

AND IT IS FURTHER ORDERED that said writ of error operate as a supersedeas and the defendant be admitted to bail upon furnishing a bond in the penal sum of twenty-five hundred dollars

($2500.00) conditioned according to law, to be approved by the undersigned.

CHAS. E. WOLVERTON,
Judge.

Service accepted this 24th day of March, 1924.

MILLAR E. McGILCHRIST,
Assistant United States Attorney,
Attorney for Plaintiff.

Filed March 24, 1924. G. H. Marsh, Clerk. [20]

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AND AFTERWARDS, to wit, on the 24th day of March, 1924, there was duly filed in said court a supersedeas bond on writ of error, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

No. C.—10,471.

Indictment—Sections 3 and 21, Title 2, National Prohibition Act.

THE UNITED STATES OF AMERICA
vs.
PASCO BAKOTICH.

BAIL BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That I, Pasco Bakotich, as principal, and J. P. McCann and Ole Nelson of the county of Clatsop, State and District of Oregon, as sureties, are by

these presents firmly held and bound unto the United States of America in the full sum of Twenty-five Hundred Dollars ($2500.00) to be paid to the United States of America, to which payment well and truly to be made we hereby bind ourselves, our heirs, assigns, successors, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of March, A. D. 1924.

WHEREAS, on the 15th day of March, 1924, at Portland, Oregon, in the District Court of the United States for the District of Oregon in a cause pending in said court between the United States of America as plaintiff, and Pasco Bakotich as defendant, a judgment and sentence was rendered against said Pasco Bakotich and the said Pasco Bakotich has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit directed to the United States District Court of Oregon to reverse the judgment and sentence in said [22] cause, and also a citation directed to the said United States of America citing and admonishing the United States of America to be and appear in said court thirty days from and after the date of said citation, which citation has been duly served upon the United States of America.

NOW, THEREFORE, the condition of this obligation is such that if the said Pasco Bakotich shall appear in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument, or when required by law or by the rule of said Court, and from day to day

thereafter until such cause shall be finally disposed of, and shall abide by, and obey, the judgment and all orders made by said Circuit Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct if the judgment and sentence against him shall be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

PASCO BAKOTICH,
Principal.
J. P. McCANN,
Surety, Residing at Astoria, Oregon.
OLE NELSON,
Surety, Residing at Astoria, Oregon.

State of Oregon,
County of Clatsop,—ss.

I, J. P. McCann, and I, Ole Nelson, whose names are subscribed to the foregoing obligation as surety, being first severally sworn, do each severally depose and say:

That I am a freeholder and resident within the State of Oregon, and am worth the sum of Two Thousand Five Hundred ($2,500.00) Dollars over and above all my [23] just debts and liabilities, and exclusive of property exempt from execution.

J. P. McCANN.
OLE NELSON.

Subscribed and sworn to before me this 18th day of March, 1924.

[Seal] HOWARD K. ZIMMERMAN,
United States Commissioner for District of Oregon, Residing at Astoria, Oregon.

Approved this 24th day of March, 1924.

CHAS. E. WOLVERTON,
Judge.

Service of the foregoing received at Portland, Oregon, this 24th day of March, 1924.

MILLAR E. McGILCHRIST,
Assistant United States Attorney.

Filed March 24, 1924. G. H. Marsh, Clerk. [24]

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AND AFTERWARDS, to wit, on the 12th day of May, 1924, there was duly filed in said court, a bill of exceptions, in words and figures as follows, to wit: [25]

In the District Court of the United States for the District of Oregon.

UNITED STATES,
Plaintiff,

vs.

PASKO BAKOTICH,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the 19th day of February, 1924, at the hour of ten o'clock A. M. during the —— term of said Court, this cause came on for trial before the Honorable Judge Wolverton, Judge of the District Court of the United States for the District of Oregon, and the Honorable Millar E. McGilchrist appearing for the Govern-

ment and C. W. Robison and Frank J. Lonergan for the defendant, and this matter coming on for trial upon the issue therein joined before a jury for that purpose duly impaneled and sworn, the defendant and the Government, in support of the issues, produced and offered the following evidence contained in reporter's notes which are filed in the District Court of the United States for the District of Oregon, Portland, Oregon.

That at the conclusion of the Government's case the defendant in support of his issues produced and offered the following evidence contained in reporter's notes which are filed in the District Court of the United States for the District of Oregon, Portland, Oregon, the same being a transcript and translation of reporter's notes, which transcript is on file in the office of clerk of said Court. And thereafter the defendant duly made, served and argued a motion for new trial, which said motion for new trial was denied, to which defendant duly excepted. That thereafter it was stipulated between the Government and the defendant that the defendant may prepare his [26] bill of exceptions in narrative form, which said narration should be confined strictly to testimony as offered in said cause, which said narration has been examined by the Government and conceded to be a true and correct statement of the matters and things testified to on direct and cross-examination by the only witness called for the defense, the defendant himself, and which said transcript of reporter's notes of said testimony are filed with the Clerk of the

(Testimony of Pasco Bakotich.)

District Court of the United States for the District of Oregon, and which is as follows:

## TESTIMONY OF PASKO BAKOTICH, IN HIS OWN BEHALF.

### NARRATIVE OF DEFENDANT.

My name is Pasko Bakotich. I am the owner of 83–7th Street. I am a resident and citizen of the United States and have lived in the United States twenty-six years. I am married and my family consists of myself, my wife and four children. On first coming to Astoria I was a fisherman and later bought a grocery store and fish market, in which I was in business for about two and one-half years. I then went to work for other parties and afterwards went fishing again. I fished this time for about three years. I couldn't stand fishing—my lungs were bad and my heart was getting weak. I have been sick for about eight years steady. I was attended by Dr. Kinny of Astoria, who treats consumptive people and later I went to Dr. Matsen. After the fire in Astoria I went to Seattle and in about January, 1923, I bought the business I now have in Seattle. I came back to Astoria in July, 1923. From the time we opened the place I have not changed any partitions or part of our building. There is an entrance in the back to the basement. This basement is wide open. It is a big basement, probably sixty feet wide and one hundred feet long, and covers all the floors in that block. There is a trap door there where we throw the empty bottles

(Testimony of Pasko Bakotich.)

and boxes that are about the place. I heard McGhee testify.

Q. Before we get to McGhee—since you have operated that place, to your knowledge, has a drunken man ever been arrested out of there?

[27] A. No, sir.

Q. Has ever any liquor been sold in there?

A. No, sir.

Q. You heard McGhee testify. Just tell the jury —talk to them so they can hear you—how you saw McGhee, how long you have known McGhee, all about that incident.

A. Well, McGhee, beginning when he come in the place?

Q. Yes.

A. There was another friend of mine, kind of old man, working in logging camp, I was playing a game of pitch with him for cigar, and beat him two games. And McGhee come in alongside this man, and asked me for a drink. I say, "What kind of drink do you want? What do you mean, drink?" I say, "What do you mean, drink? Soda water, water, or what do you want?" He looks kind of sick to me, pale in the face. "Why," he says, "Come on, Paul, give me a drink." I asked him, I says, "McGhee, this is two or three times this week you have come in to this place. I don't know what you mean. Now, you better look out, don't come back, because you know very well we don't sell that stuff in this place. I never yet did sell one man, and I don't handle that stuff." He says,

(Testimony of Pasko Bakotich.)

"Paul, please give me drink, because I am sick"; and you know so many times he is sick, and sick, and put his hand like this (illustrating). "Paul, please give me drink." I say, "McGhee, I ain't got any. Get off me." I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. "Well, you don't know what happened to me last night."

Q. Who said that?

A. McGhee. He says, "You don't know what happened to me last night." I says, "I don't know —fight?" "No," he says, "I went down on Astor Street, on some joint, and," he said, "I had about three hundred some odd dollars, just come from the camp. I am clean broke." So, to tell you the truth, I had a bottle a little bigger than this one, in my possession. [28]

Q. What bottle is that?

A. This is pills from Dr. Matson.

Q. How big was the bottle you had?

A. Just a little bigger than this bottle. And I had this for myself, you know, some time when I feel bad. I can't help it, you see, I am sick sometimes. Doctor tells me no smoke. I tell him I don't smoke—I smoke right now. Dr. Matson tell me don't smoke for three years, and Dr. Matson sent order for doctor, so he give me order for the same pills, and no smoke, no drink whiskey. A friend of mine tell me, "What are you looking for doctor? Whiskey is good for your sickness. Your lung is bad." He says, "It won't *small hurst.*"

(Testimony of Pasko Bakotich.)

I am no drinker, that I was ever drunk in my life, or drink so much; but I just have used little bit, and have in my pocket when I feel so bad, I go in some where in back room to have a little bit. Lasts me about three drinks, to take that way. Little bigger bottle than this—about three drinks.

Q. What did you do?

A. Then I took out from my pocket, I seen him so sick, I thought to save his life. I know what sickness is. And I poured it out in glass. I said, "Go ahead, McGhee." Then he come out, went in his pocket. He says, "Paul, I want you this, because, I know, of course, your money." I say, "No. That don't cost me money at all. I didn't buy that. There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if want help go ahead. Take your money back, I don't want your money." And I didn't take his money. So then he see that something is wrong, that I don't take it away from him. *The he* don't want the drink. So he took it he went back from the door, just as he was himself about three or four feet, he took his gun out, he says, "Stay where you are." I put my hand like this—I say, "I won't move." I stood right up. Chief of Police, about three minutes after, come in. He says, "What have you got in your hand?" He says, "There is whiskey; Paul gave it to me." "Is Paul under arrest?" "Yes, sir." He asked me, [29] "Paul, give me empty bottle." So I went down, I give him bottle—he poured that from the glass in

(Testimony of Pasko Bakotich.)

the bottle. He just took me in his own machine up to the station.

Q. In his own machine?

A. Yes, sir, in his own machine up to the station. He had the whiskey right here in his pocket. I could grab it from that, and throw it in the street.

COURT.—Who had the whiskey?

A. The Chief had the whiskey, alongside. I was sitting in front of him, right in front of the car, and he had that same whiskey in bottle.

COURT.—Oh, yes, he had that?

A. Yes, he got that right in his pocket.

Q. Did you have any talk with the Chief about the sale of this liquor to McGhee?

A. Well, one day Chief come to my place, and called me to one side. "Paul," he says, "It is the best thing you come up and see city attorney. He told me to tell you to come up and see him." So I didn't know what. So Chief went out there. Some time I had in cigar-store, so I give it to him, every time he come in the place, I give it to him, he ask for it, every time he take smoke. I call up Mr. Zimmerman, United States Commissioner, I say, "Mr. Zimmerman, did you—"

Mr. McGILCHRIST.—Your Honor, as to what took place, Mr. Zimmerman is not called as a witness—I don't believe what took place between this defendant and Mr. Zimmerman is material in this case.

Mr. ROBISON.—I was going toward the answer

(Testimony of Pasco Bakotich.)

to the Chief's statement as to the conversation he had.

COURT.—Confine yourself to that.

Q. Paul, not what conversation you had with the United States Commissioner or the city attorney, but what conversation you did have with the Chief of Police about this?

A. Chief, he tells me that Mr. Zimmerman, the city attorney, wanted to see me—that is what he told me—about this case. [30]

Q. I see. Was the Chief of Police there when you talked to Mr. Zimmerman? A. No, sir.

Q. Now, there has been some testimony in this case that you had a bottle or glass—milk bottle or glass, or half-gallon pitcher, which you rinsed out every time the officers came in? A. No, sir.

Q. Did you ever have a half-gallon pitcher in the place?

A. I had one pitcher was about, maybe a quarter, we used to buy coffee in the morning from the restaurant. We didn't have no cooking stove inside.

Q. Did you ever have any cooking in there?

A. Yes, we cook roasting—that is all. We buy coffee sometimes from restaurant, same pitcher.

Q. There has been some testimony here that time after time the officers came in there, and either yourself or Bosciola rinsed out these glasses and pitchers and jugs. Did you ever do that?

A. Well, I will tell you, maybe sometime. We

(Testimony of Pasko Bakotich.)

got lots of glasses, a fellow is busy, wash beer glass. I probably some time maybe washed glasses. I won't say nothing about that.

Q. Now, did you ever throw any liquor, or dump any liquor into that sink? A. I never did.

Q. Or, did anybody, to your knowledge, ever dump or throw any liquor in that sink?

A. I don't think—I don't see any. I don't believe they did. I don't believe anyone did.

Cross-examination.

A. After he asked me, and I give it to him, he took out money.

Q. What?

A. After I give him drink, he took out money. He says, "Take it. Friend of mine gave me 50 cents. I don't want this for nothing. I [31] know you don't get it for nothing yourself." I says, "No, I didn't pay for that."

Q. They lied when they went on the stand and said that?

A. Yes. They are after me to sell moonshine, but I am not going to do it. They are after me, to make some money from me.

(By the COURT.)

Q. Did you pour this liquid out into the glass for him to drink? A. Yes, sir, I did.

Q. Did he put anything else with it?

A. No, sir.

Q. How much was in the glass when you gave it to him?

(Testimony of Pasko Bakotich.)

A. Oh, I figure about an ounce and a quarter. There won't be very much difference, but just a little bigger than this bottle.

Q. Did you give him the full contents of the bottle? A. Yes, sir, I did give him every drop of it.

Q. And you gave him this bottle to put it in?

A. I gave him this bottle and he took it up to the station.

Q. So you think that looks like the liquid you gave him?

A. Yes, it looks like the same, I guess.

That thereafter the defendant submitted to the Court the following instructions:

I.

The Court instructs the jury that in cases where the criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the state, used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but on the other hand, if the accused never conceived any intention of committing the offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced [32] him to commit the offense charged, in order to entrap, arrest and prosecute him theretofore, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in rela-

tion to the alleged sale of the said intoxicating liquor to the witness McGhee.

II.

The Court instructs the jury where the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be had through, the criminality of the act is not affected by any question of consent, therefore if you find from the evidence in this case that the officer McGhee or any officer of the State of Oregon, or of the city of Astoria, lured or induced the defendant, Pasko Bakotich, to collect the offense charged in order to prosecute him therefor, then I instruct you that your verdict should be not guilty.

That thereafter the Court instructed the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

Gentlemen of the Jury:

This defendant is charged by an information of the United States District Attorney with, first, having in his possession moonshine whiskey, fit for beverage purposes, and containing more than one-half of one per cent of alcohol; second, with having sold a quantity of moonshine whiskey of the same nature; and, third, with having maintained what is styled under the law a common nuisance. Those are the three charges in the information. That is to say, the information contains three counts.

Now, the defendant has entered a plea of not guilty. That plea, Gentlemen of the Jury, puts in

issue every material allegation of the information, and every element of each count thereof, and that places upon the Government the burden of establishing, to your satisfaction [33] beyond a reasonable doubt, every material allegation of the information, and every element which goes to make up the charges preferred against the defendant.

The defendant, under the Constitution and the laws of this country, and under the policy of the laws and institutions, is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and that presumption, Gentlemen of the Jury, abides and remains with the defendant throughout the entire trial, and until the evidence in the case satisfies your minds, beyond a reasonable doubt, of the guilt of the defendant.

Now, the defendant is charged here upon the three offenses which I have indicated to you, and he is to be tried upon those three offenses alone. He cannot be convicted for any other offense that he may have committed than these three that have been specified in the information.

The elements of these offenses are: as to the first count, that the defendant did have possession of the liquor. Possession means simply the right to dispose of, the right to do with as he desired, or the right to use it as he might desire; and this fact of possession, as alleged, must be proven and established on the part of the Government beyond a reasonable doubt.

Under the second count, the simple element is, did the defendant sell moonshine whiskey to Mc-

Ghee. A sale is simply an understanding between the parties, whereby one party passes property to another party for a consideration. And this fact must be proven to your satisfaction beyond a reasonable doubt.

Under the third count, the defendant is charged with having maintained a common nuisance. Now, Gentlemen of the Jury, under the law, a common nuisance is a place where whiskey or intoxicating liquor is kept or sold, or manufactured, or dispensed in any way, unlawfully. So that is what we understand by a common nuisance. And the fact alleged here must be established by the Government to your satisfaction [34] beyond a reasonable doubt.

Now, there has been testimony admitted here, Gentlemen of the Jury, tending in some way to show that the defendant had, prior to this time, either been dealing with intoxicants, or had them about his premises, or was exhibiting acts which would tend in some measure to show that he was engaged in the business of dispensing intoxicating liquor. I refer to the testimony of the Chief of Police and the other officer who testified here. This testimony is not permitted to go to you for the purpose of proving the sale that was made on that date of September 14th; but it is admitted for the purpose of showing, if it has that effect, whether or not the defendant was maintaining and keeping a common nuisance. A nuisance is, under the law, a continuing affair. Perhaps a single sale alone, without other corroborating circum-

stances, would not prove a nuisance, or the maintenance of a nuisance; but you may take that into consideration, with the demeanor of the defendant about his place of business. Hence his testimony that I speak of now has been admitted for your consideration to determine whether or not the defendant has so demeaned himself there, with reference to this place of business, that you may thereby infer that he was maintaining a place where liquor was sold, or being dispensed or dealt in. And that is the reason that testimony is offered.

The Court has permitted to go to you also testimony touching the general reputation of this place as to being a place where liquor was sold and dispensed. General reputation is competent evidence in a case of this kind, and so the officers, both of them, have testified to this general reputation. This I allowed to go to you for the purpose of establishing, to the extent that the proof might be competent in your minds for that purpose, the fact as to whether the defendant was maintaining a common nuisance at that time.

Something has been said here about a decoy, or about the act of McGhee acting as a decoy, in order to induce this defendant to commit [35] the offense with which he is charged here. A person, and an officer, has a perfect right, for the purpose of determining whether crimes have been committed, to, as in this case, approach the person who is suspected and propose to purchase liquor of him. That is done every day. It is done with reference

to the postoffice departments. An officer who is carrying the mails, for instance, is suspected of taking money in it, and at the end of the route it is found that the letter has been opened and the money taken out. The fact of putting the decoy letter in the mail is for the purpose of obtaining information as to whether the person suspected is transgressing the law. So, in this case, McGhee had a perfect right to go to this defendant and propose to buy liquor of him, for the purpose of determining and ascertaining whether or not the defendant was engaged in the business of selling liquor; and that is about all there is to that.

Now, the question comes up to you, on the first count, did the defendant have possession of this liquor? He comes into court, and admits that he had possession of the liquor, and that perhaps the same liquor that is found in the bottle there is the liquor that he did then and there turn over to McGhee. Possession is presumptive evidence that the person has committed the offense of having it unlawfully. When that is shown, the burden is cast upon the defendant to show that he had and possessed the liquor lawfully. There are circumstances under which a person may possess liquor lawfully. For instance, if he had the liquor before the Prohibition Act went into effect, or before the constitutional amendment became effective, that liquor would be lawfully held by him. Or he may possess it lawfully by getting it through the prescription of a doctor, and in other ways that may be set forth in the prohibition law itself. But now the

burden is cast upon the defendant to show that he had this liquor lawfully. If he failed to do that, he is guilty under that first count in the indictment of possessing liquor.

Now, as to the sale, it seems that the immediate question as to [36] whether a sale took place between the defendant and McGhee depends almost alone upon the testimony of McGhee and the defendant. They do not concur in what they say about it. The defendant says that he gave the liquor to McGhee. Of course, the Government, having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration, the count is not proven. But the question here, Gentlemen of the Jury, is for you to determine, as between these two men, which one is telling the truth. Is McGhee telling the truth when he says he paid 50 cents for this liquor; or is the defendant telling the truth when he says that he gave the liquor to McGhee? You may take into consideration all the circumstances surrounding the entire transaction—what was done and said there, and the probabilities of the fact, and determine for yourselves whether or not, beyond a reasonable doubt, the Government has established the fact, as alleged, that the defendant sold liquor, intoxicating liquor, or moonshine, to the plaintiff.

As to the third count, Gentlemen, I have described that to you quite fully, and the question is, Did the defendant maintain a common nuisance, as defined by the prohibition law? And you may determine that from all the facts and circumstances,

together with the manner in which he dealt in that place prior to the occurrence of this specific transaction, and all the testimony in the case.

In determining as to these matters, you will consider all the testimony in the case, both that given by the Government and that by the defendant, and harmonize it, if you can; but, if you cannot, then determine, from the entire testimony, whether or not the defendant is innocent or whether he is guilty.

A reasonable doubt, Gentlemen of the Jury, is not every captious doubt that might be raised for the purpose of getting rid of the question in hand. But it is a thing of substance. It is a doubt that would cause reasonable men to hesitate before acting in the more important affairs of life. It is such a doubt, applying it here, under [37] the consideration of all the testimony, with you acting as reasonable and fair-minded men, as will cause you to hesitate, and not to be able to say, under your conscientious views, that the defendant is guilty in this case. If you believe, Gentlemen, to a moral certainty, that the defendant has committed the offenses here charged, then you should find him guilty. If you cannot say, to a moral certainty, that he is guilty of these offenses, then you should acquit him.

You, Gentlemen of the Jury, are the judges of the effect of the testimony. The Court gives you the law, and you take that from the Court, and apply it implicitly; but when it comes to determining what the testimony in the case proves, that is a

function for you, and for you alone, and not for the Court.

A witness is presumed to speak the truth, but that presumption may be overcome by the manner in which he testifies, and by the character of his testimony, and by evidence affecting his character or his motives, or by contradictory evidence. A person found to be wilfully false in one particular is to be distrusted in all. And so you may take into consideration the interest that a witness may have in the outcome of this case, or in any other fact or circumstance or matter that may seem to have some bearing upon his credibility, and, in this way, Gentlemen of the Jury, you determine the credibility of the witnesses. When you have done that, you will be the better enabled to say, in the end, what your judgment shall be.

The defendant here has taken the witness-stand and testified in his own behalf. In determining the credibility of his testimony, you will apply the same rules as to the admission of evidence that I have given you as applicable to other witnesses in the case. You may take into consideration the interest he has in the outcome of this case, and any other fact or circumstance that seems to have a bearing upon the credibility of his testimony.

That thereafter as shown on page 26 of the transcript, the defendant, through his counsel, Mr. Lonergan, excepted as follows: [38]

"Are there any exceptions, Gentlemen?

Mr. LONERGAN.—If the Court please, the defendant would like to save an exception to the re-

fusal of the Court to give the instructions requested by the defendant.

COURT.—Yes, you may have your exception.

Mr. LONERGAN.—And we would like an exception to the illustration given by the Court with reference to decoy letters in the mail service.

COURT.—Very well."

Whereupon the following narrative statement having been presented to the Court and by him examined, by the direction of the Court there is now included herein the direct examination of one Earl McGhee, called as a witness on behalf of the plaintiff, as follows, to wit: [39]

## TESTIMONY OF EARL McGHEE, FOR PLAINTIFF.

Direct Examination of EARL McGHEE.

(Questions by Mr. McGILCHRIST.)

Now, Mr. McGhee, you are a police officer of the city of Astoria, are you not? A. Yes.

Q. How long have you been such police officer?

A. A little over five months, I believe. I was appointed the 8th day of September, 1923.

Q. And you were such police officer on September 14, 1923, were you not? A. Yes, sir.

Q. Do you know the defendant Pasco Bakotich?

A. Well, I know him, yes.

Q. You see him in the courtroom? A. Yes, sir.

Q. Where? Just point him out.

A. That is the gentleman sitting right there.

Q. This is Pasco Bakotich? A. Yes, sir.

(Testimony of Earl McGhee.)

Q. When did you first see Pasco Bakotich, the defendant in this case, Mr. McGhee?

A. Why, it was probably a couple of days before I made the purchase.

Q. A couple of days before what time?

A. The 14th of September.

Q. The 14th of September, 1923? A. Yes.

Q. Where did you see him?

A. He was behind the bar.

Q. In what place? A. In this same place.

Q. Describe this place.

A. It is 83 Seventh Street, I think is the number, city of Astoria.

Q. What county? A. Clatsop County.

Q. Oregon? What was he doing when you saw him, as you remember a few days before the 14th day of September, 1923? [40]

A. Well, he was attending the duties ordinarily of a bartender in a place of that kind.

Q. What kind of a place is this 83 Seventh Street?

A. Well, what I know of the place it was kind of soft-drinks, cigars, tobacco; also—

Q. Well, we will come to the other business being conducted there. It is ostensibly then a soft-drink place, where soft-drinks and cigars are being sold?

A. That is what it is generally known to be.

Q. And Pasco Bakotich on the day—that would be the 12th of September—was behind the bar when you first saw him? A. Yes, sir.

Q. Since that time have you seen him in that place? A. On September 14th.

(Testimony of Earl McGhee.)

Q. Now, just tell the jury, Mr. McGhee, when you say him on that day and where.

A. You mean on the 14th?

Q. September 14th, 1924.

A. It was 11:15 in the morning of September 14th when I entered the place, and I ordered a drink of whiskey.

Q. From this defendant?

A. From Mr. Bakotich.

Q. All right. Just tell the jury what took place.

A. Well, he served the drink. I tendered him the cash money for it.

Q. How much did you pay him?

A. I handed him a five-dollar bill.

Q. Yes?

A. And he rang it up in the cash register and gave me four fifty change. My drink was sitting on the bar.

Q. You may state, Mr. McGhee, where he secured the drink that he served to you. [41]

A. Well, he had it in a container just under the top of the bar. He reached under the bar. I didn't see the transaction. I didn't see what he filled the glass out of. I didn't see the container. But he brought the glass out, set it on the bar in front of me.

Q. When you went down to that place, Mr. McGhee, with whom did you go?

A. I went down there practically by myself, though Chief Entler and Captain Colby were behind me.

(Testimony of Earl McGhee.)

Q. You may state whether or not they knew where you were going on that particular day.

A. Yes, they did.

Q. They knew you were going to the place of Pasco Bakotich? A. Yes.

Q. So they were behind you, were they?

A. They were.

Q. All right. Now, you have stated that this defendant poured you out a glass of liquor?

A. Yes, sir.

Q. And you paid him fifty cents for it—gave him a five-dollar bill? A. Yes.

Q. Now, what did you do after that, Mr. McGhee?

A. I picked up the glass, and I stepped back down to the rear end of the bar, that is away from the entrance door, and I told him that was one mistake that he had made; that he had sold a drink to an officer. I told him he was under arrest for the sale of intoxicating liquor.

Q. What did he do at that time, if anything?

A. Well, he made a movement with his hand and arm under the bar, and I heard something fall, turn over, then he stepped back away from the bar; seemed to be more or less overcome [42] with the announcement that I made, when I showed the badge and placed him under arrest.

Q. State whether or not he made any attempts to destroy the liquor that you had got.

A. No, he made no attempt to destroy the evidence I had in hand.

(Testimony of Earl McGhee.)

Q. Where was he at the time you purchased the liquor, where was he with reference to where you stood? He was behind the bar, was he?

A. He was behind the bar; yes.

Q. And the bar, of course, was between you?

A. Yes.

Q. Now, Mr. McGhee, then you stated that you place him under arrest? A. Yes, sir.

Q. What transpired? Did anybody else assist you in arresting this defendant, or not?

A. Well, yes. The Chief entered about that time.

Q. Now, with reference to the delivery of the liquor to you, and the payment of the money by you to this defendant, when did the Chief enter?

A. Immediately after. I don't think the Chief saw the actual transaction.

Q. You don't know exactly what the Chief saw, of course? A. No, he was outside.

Q. Did you see where the Chief was as you entered?

A. No, I didn't. I couldn't say exactly where he was.

Q. Did you see him before you had purchased the moonshine whiskey from this defendant?

A. No, I didn't see him after I entered the place until after I made the purchase.

Q. Had you actually placed your hands upon the defendant before the Chief entered the place? Just state what are the facts [43] in reference to that.

(Testimony of Earl McGhee.)

A. No, I never made any effort to place my hands on him, or anything of that kind at all.

Q. What did you do? You stated you placed him under arrest, what did you do?

A. I simply told him that he was under arrest for selling intoxicating liquors.

Q. Then with reference to that, when did Chief Entler and Mr. Colby enter the place?

A. Chief Entler entered just about that particular moment.

Q. Now, you stated you were served. How were you served this moonshine? What was it served you in? A. It was served in a glass.

Q. Now, I hand you a glass, and ask you if you can identify that glass.

A. Yes, sir, that is the glass.

Q. You say that is the glass. What glass?

A. Either the same glass the liquor was served in or an exact duplicate.

Q. Did you put your initials on that glass or not?

A. No, sir. Chief Entler put the label on it.

Q. In your presence? A. Yes.

Q. You saw that placed on there, did you, by Chief Entler? A. Yes, sir.

Q. Now, with reference to the liquor that was served you in the glass, what did you do with it.

A. I turned it over to the Chief when he entered.

Q. What did he do with it, if you know?

A. He asked Bakotich for a bottle.

Q. What happened?

A. Bakotich gave him a bottle similar to the one that is sitting on the desk there. [44]

(Testimony of Earl McGhee.)

Q. Similar to this bottle? I hand you this bottle, and ask you if this is the bottle, or if you can identify that bottle.

A. Yes, sir. That is the same bottle, I think.

Q. Well, now, how do you identify it? Were you present when this was pasted on? A. Yes.

Q. You didn't put your initials on it any way?

A. No.

Q. Where was that pasted on?

A. It was pasted on in the police station.

Q. Now, Mr. McGhee, did Bakotich, the defendant here, make any statement, at the time you placed him under arrest or subsequent, with reference to this transaction?

A. He never said anything to me, no.

Q. Is he the proprietor of this place, this defendant? A. As far as I know, he is.

Q. Well, now, as far as you know—what knowledge have you? You may state whether or not he has ever told you that he was the proprietor of this place. A. No, he never did.

Q. What knowledge have you that he is the proprietor of the place?

A. I couldn't say that I have any direct knowledge that he is the owner of the place. He never made any statement to me himself, but others have. That is the only way I could know.

Q. That is not evidence. Had you ever been into this place prior to this time, Mr. McGhee?

A. I was in there once before I made the purchase, yes.

(Testimony of Earl McGhee.)

Q. You were in there once? A. Yes, sir.

Q. When was that, Mr. McGhee?

A. That was probably two days before I made this purchase.

Q. What transpired on that day? [45]

A. About the same as in this case, with the exception that I was not served. I made the effort to buy a bottle.

Q. From whom? A. From Bakotich.

Q. On the two days before?

A. Yes, sir. I would say it was two days before. He refused me under the excuse that he didn't have that much at the time; he couldn't spare that much that evening.

Q. Did he say to you that he had any on hand?

A. He didn't say whether he had any on hand or not. He said, "I haven't got that much," was the statement he made when I asked for the bottle.

COURT.—What sized bottle?

A. Pint bottle.

Q. How long have you been in town prior to the time you went in there? You said you went in there two days before; that would be September 12th? A. Yes.

Q. You had been in town how long?

A. I had been in town since the fall of 1915.

Q. Oh, you have lived in Astoria for some time?

A. Yes, sir.

Q. Did you know Bakotich?

A. Well, I didn't know him personally. I knew him as a man around town. He was familiar, see-

(Testimony of Earl McGhee.)

ing him on the streets and different places at different times.

Q. Did you know the place he was conducting prior to the time you went in there?

A. No, I couldn't say that I did, that is as to any direct knowledge that he was running the place.

Q. State whether or not you know the reputation of this place in the community in which it exists as to its being a place where intoxicating liquors are commonly kept and sold. [46]

A. About all that I actually know about it is what I have already stated. [47]

## CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

United States of America,
District of Oregon,—ss.

I, Chas. E. Wolverton, one of the Judges of the District Court of the United States for the District of Oregon, and the Judge who presided over the above-entitled cause, in order that the matter set forth in the foregoing bill of exceptions may be made a part of the record of this case, on appeal to the United States Circuit Court of Appeals for the 9th Circuit, do hereby certify that the within bill of exceptions is correct in every particular and is presented upon a stipulation of the parties hereto made before me in open court and that the same is hereby settled and allowed and approved as and for a bill of exceptions in this cause and made a

part of the record herein. Done in open court this 12th day of May, 1924.

CHAS. E. WOLVERTON.

Service of the foregoing bill of exceptions and copy thereof received at Portland, Oregon, this 12th day of May, 1924.

MILLAR E. McGILCHRIST,
Asst. United States Attorney,
Attorney for Plaintiff.

Filed May 12, 1924. G. H. Marsh, Clerk. [48]

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AND AFTERWARDS, to wit, on the 14th day of May, 1924, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [49]

In the District Court of the United States for the District of Oregon.

No. C.—10471.

THE UNITED STATES OF AMERICA
vs.
PASCO BAKOTICH.

PRAECIPE FOR TRANSCRIPT OF RECORD.

Honorable G. H. Marsh, Clerk United States District Court, Portland, Oregon.

Dear Mr. Marsh:

Will you please prepare transcript of record in the case of United States vs. Bakotich to the

United States Circuit Court of Appeals for the 9th Circuit and include therein the following record:

1. Information.
2. Record of arraignment and plea.
3. Record of trial and verdict.
4. Motion for new trial.
5. Order denying motion for new trial.
6. Sentence.
7. Petition for writ of error.
8. Assignment of errors.
9. Order allowing writ of error.
10. Bill of exceptions.

E. M. MORTON,
Of Attorneys for Defendant.

Filed May 14, 1924. G. H. Marsh, Clerk. [50]

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## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 48 inclusive, constitute the transcript of record upon said writ of error, in the case in said court in which the United States of America is plaintiff and defendant in error, and Pasco Bakotich is defendant and plaintiff in error; that said transcript of record has been by me prepared in accordance with the direction of the said

plaintiff in error, and is a full, true and complete transcript of the record and proceedings had in said court in said cause as the same appear of record at my office and in my custody.

I further certify that the cost of the foregoing transcript is $11.45, and that the same has been paid by the said plaintiff in error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 24th day of July, A. D. 1924.

[Seal] G. H. MARSH,
Clerk. [51]

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[Endorsed]: No. 4354. United States Circuit Court of Appeals for the Ninth Circuit. Pasco Bakotich, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Received July 28, 1924.

F. D. MONCKTON,
Clerk.

Filed October 3, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States District Court for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PASCO BAKOTICH,

Defendant.

ORDER ENLARGING TIME TO AND INCLUDING JULY 30, 1924, TO FILE RECORD AND DOCKET CAUSE.

Now, at this day on motion of defendant above named and for good cause shown IT IS ORDERED that said defendant be and he is hereby allowed to and including the 30th day of July, 1924, in which to file his transcript of record and docket the above-entitled cause in the United States Circuit Court of Appeals for the 9th Circuit.

CHAS. E. WOLVERTON,

Judge.

Dated: May 14, 1924.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 30, 1924, to File Record and Docket Cause. Filed May 16, 1924. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

C.—10471.

March 24th, 1924.

THE UNITED STATES OF AMERICA

vs.

PASCO BAKOTICH.

ORDER ENLARGING TIME TO AND INCLUDING MAY 23, 1924, TO FILE RECORD AND DOCKET CAUSE.

Now, on this day on motion of defendant and for good cause shown, IT IS ORDERED that defendant herein be and he is hereby allowed sixty days from March 24, 1924, in which to file his transcript of record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 4354. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including May 23, 1924, to File Record and Docket Cause. Filed Mar. 26, 1924. F. D. Monckton, Clerk. Refiled Oct. 3, 1924. F. D. Monckton, Clerk.

No. 4354

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR.

**Upon Writ of Error to the United States District Court of the District of Oregon.**

Mr. Charles W. Robison, Astoria, Oregon,
and Mr. E. M. Morton, Yeon Building,
Portland, Oregon,
For the Plaintiff in Error.

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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PASCO BAKOTICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

On the 21st day of November, 1923, there was sworn to before J. H. Marsh, Clerk of the United States District Court for the District of Oregon, an information charging Pasco Bakotich with the violation of Sections Three and Twenty-one of Title Two of the National Prohibition Act.

This information contained three counts; the count of possession, the count of sale, and the count of nuisance.

Thereafter, on the 12th day of January, 1924, the defendant herein was arraigned and entered a plea of not guilty. Thereafter a trial was held and on the 20th day of February, 1924, a verdict was returned, which verdict was to the effect that the jury found the defendant guilty of all three counts of the information.

All orders and matters pertaining to the appeal are set forth in the Transcript of Record, pages 1 to 55, inclusive.

There is but one question involved in this case, and that is the question whether or not the defendant in this case was entitled to receive the instructions on *entrapment* as found on pages 33 and 34 of the Transcript of Record. The defendant predicates error upon the refusal to give defendant's instructions I and II, which are as follows:

I.

The Court instructs the jury that in cases where the criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the State, used decoys or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution, and the accused is entitled to a verdict of not guilty in relation to the alleged sale of the said intoxicating liquor to the witness McGhee.

II.

The Court instructs the jury where the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be

had, though the criminality of the act is not affected by any question of consent, therefore, if you find from the evidence in this case that the officer McGhee or any other officer of the State of Oregon, or of the city of Astoria, lured or induced the defendant, Pasco Bakotich, to commit the offense charged in order to prosecute him therefor, then I instruct you that your verdicts should be not guilty.

Together with this, and a corollary of the same proposition, the defendant predicates error upon the Court instructing the jury as was instructed on pages 37 and 38 of the Transcript of Record as follows:

> "Something has been said here about a decoy, or about the act of McGhee acting as a decoy, in order to induce this defendant to commit the offense with which he is charged here. A person, and an officer, has a perfect right, for the purpose of determining whether crimes have been committed, to, as in this case, approach the person who is suspected, and propose to purchase liquor of him. That is done every day. It is done with reference to the postoffice departments. An officer who is carrying the mails, for instance, is suspected of taking money in it, and at the end of the route it is found that the letter has been opened and the money taken out. The fact of putting the decoy letter in the mail is for the purpose of obtaining information as to whether the person suspected is transgressing the law. So, in this case, McGhee had a perfect right to go

to this defendant and propose to buy liquor of him for the purpose of determining and ascertaining whether or not the defendant was engaged in the business of selling liquor; and that is about all there is to that."

(Transcript of Record, pages 37 and 38.)

## ERRORS RELIED UPON.

The Court erred in refusing the instructions of defendant, Pasco Bakotich, as found on pages 33 and 34 of the Transcript of Record (No. 4354), to wit, the Court erred in refusing to give defendant's instruction.

### I.

The Court instructs the jury that in cases where the criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the State, used decoys or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the alleged sale of the said intoxicating liquor to the witness McGhee.

U. S. vs. Healey, 202 Fed. 349.

Voves vs. U. S., 161 C. C. A. 827; 249 Fed. 191.

Peterson vs. U. S., 166 C. C. A. 509; 255 Fed. 433.

Smith vs. State, 61 Tex. Crim. Rep. 328; 135 S. W. 154.

Scott vs. State, 70 Tex. Crim. Rep. 57; 153 S. W. 871.

The Court erred in refusing to give defendant's requested instruction II, which is as follows:

II.

The Court instructs the jury where the criminal intent originates in the mind of the entrapping person; and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be had though the criminality of the act is not affected by any question of consent, therefore, if you find from the evidence in this case that the officer McGhee or any officer of the State of Oregon, or of the City of Astoria, lured or induced the defendant, Pasco Bakotich, to commit the offense charged in order to prosecute him therefor, then I instruct you that your verdict should be not guilty.

U. S. vs. Echols, 253 Fed. 862.

People vs. Barkdoll, (Cal.) 171 Pac. 440.

State vs. Feldman, (Mo.) 129 S. W. 998.

U. S. vs. Butts, 273 Fed. 35.

Samyck vs. U. S., 240 Fed. 60.

The Court erred in instructing the jury in relation to decoy letters on the ground and for the reason that there is no analogy between a decoy letter as illustrated by the Court, and the method used as disclosed by the record. (Transcript of Record, pages 37 and 38.)

Scott vs. State, 172 U. S. 343; 42 Lord's Edition, 341.

U. S. vs. Rapp, 30 Fed. 818; In re Wight, 134 U. S. 136.

U. S. vs. Mathews, 1 L. R. A. 104; 35 Fed. 890.

State vs. Hull, 33 Ore. 63.

36 A. S. R. 295, Connor vs. People.

81 Am. Dec. 364 and note, Thompson vs. State, French vs. State.

## ARGUMENT.

Your Honors, if it please the Court, this is the case of the United States vs. Pasco Bakotich, who is charged with violation of Section Three and Twenty-one of Title Two of the National Prohibition Act. At the time of writing this brief it does not appear to me that I will be able in person to address your Honorable Body, by virtue of the fact that I do not think my client can raise sufficient funds to send counsel before this court. And if all that your Honors receive of this case is the cold print that lacks the touch and fire of the living word, may I respectfully request that you read this argument to its conclusion before reaching your decision.

The defendant is appealing from the judgment of the District Court of Oregon, and from a sentence imposed upon him, and bases his right and ground of appeal on errors alleged to have been made by the Court in instructing the jury, likewise error predicated upon the Court's refusal to give certain instructions.

Counsel for defendant feels that since in the trial of all cases, the medium by which these instructions are given to juries are words, then irrespective of the disparagement of the knowledge by the Court giving the instructions and the knowledge of counsel requesting them, that counsel may with good grace direct Your Honors' attention in relation, first, to the instructions requested; second, to the instructions given.

Pasco Bakotich lives in Astoria. He has lived here for twenty-six years. A fisherman as long as his physical condition would permit, he quitted this occupation on account of consumption, a disease prevalent in those who make their livelihood by following fishing in this vicinity. (Transcript of Record, page 26.)

The record further discloses that during the month of September, 1923, there was appointed as a police officer in the City of Astoria one Earl McGhee. McGhee had lived in Astoria since 1915. The first time he had seen Bakotich was on the 12th of September—*two days* prior to the alleged purchase of a drink of whiskey. (Transcript of Record, page 43.) His conversations with Bakotich, which are not denied in the record nor can they be denied, is

illustrative of a fact of which, I believe, Your Honors take judicial knowledge, that is, those things carried in the daily press and those things which are official actions in the small communities within Your Honors' judicial direction. If this is true, Your Honors are aware that neither Earl McGhee, the Chief of Police who appointed him, nor the Captain of Police who was present at the time of the arrest, are to-day officers of any kind—either municipal, state or Government. The winds that blew them into office blew them out again, and they are not Federal officers appointed either for their ability or their knowledge of those things which they seek to investigate. May I call to Your Honors' attention that no officer in this case who testified was a Federal officer; that this is a glorified city police case tried in a Federal court and not in a municipal court where it belongs. Bakotich's story is as follows:

"Q. You heard McGhee testify. Just tell the jury—talk to them so they can hear you—how you saw McGhee, how long you have known McGhee, all about that incident.

A. Well, McGhee, beginning when he come in the place?

Q. Yes.

A. There was another friend of mine, kind of old man, working in logging camp, I was playing a game of pitch with him for cigar, and beat him two games. And McGhee come in alongside this man, and asked me for a drink. I say, 'What kind of drink do you want?

What do you mean, drink?' I say, 'What do do you mean, drink? Soda water, water or what do you want?' He looks kind of sick to me, pale in the face. 'Why,' he says, 'Come on, Paul, give me a drink.' I asked him, I says, 'McGhee, this is two or three times this week you have come in this place. I don't know what you mean. Now, you better look out, don't come back, because you know very well we don't sell that stuff in this place. I never yet did sell one man, and I don't handle that stuff.' He says, 'Paul, please give me drink, because I am sick'; and you know so many times he is sick, and sick, and put his hand like this [illustrating]. 'Paul, please give me drink.' I say, 'McGhee, I ain't got any. Get off me.' I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. 'Well, you don't know what happened to me last night.'

Q. Who said that?

A. McGhee. He says, 'You don't know what happened to me last night.' I says, 'I don't know—fight?' 'No,' he says, 'I went down on Astor Street, on some joint, and,' he said, 'I had about three hundred some odd dollars, just come from the camp. I am clean broke.' So, to tell you the truth, I had a bottle a little bigger than this one, in my possession.

Q. What bottle is that?

A. This is pills from Dr. Matson.

Q. How big was the bottle you had?

A. Just a little bigger than this bottle. And I had this for myself, you know, some time when I feel bad. I can't help it, you see, I am sick sometimes. Doctor tells me no smoke. I tell him I don't smoke—I smoke right now. Dr. Matson tell me don't smoke for three years, and Dr. Matson sent order for doctor, so he give me order for the same pills, and no smoke, no drink whiskey. A friend of mine tell me, 'What are you looking for doctor? Whiskey is good for your sickness. Your lung is bad.' He says, 'it won't small *hurst.*' I am no drinker, that I was ever drunk in my life, or drink so much; but I just have used little bit, and have in my pocket when I feel so bad, I go in somewhere in back room to have a little bit. Lasts me about three drinks, to take that way. Little bigger bottle than this—about three drinks.

Q. What did you do?

A. Then I took out from my pocket, I seen him so sick, I thought to save his life. I know what sickness is. And I poured it out in glass. I said, 'Go ahead, McGhee.' Then he come out, went in his pocket. He says, 'Paul, I want you this, because, I know of course, your money.' I say, 'No. That don't cost me money at all. I didn't buy that. There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if you want help go ahead. Take your money back, I don't want your money.' And I didn't take his money.

So then he see that something is wrong, that I don't take it away from him. Then he don't want the drink. So he took it he went back from the door, just as he was himself about three or four feet, he took his gun out, he says, 'Stay where you are.' I put my hand like this—I say, 'I won't move.' I stood right up. Chief of Police, about three minutes after, come in. He says, 'What have you got in your hand?' He says, 'There is whiskey; *Paul gave it to me.*' 'Is Paul under arrest?' 'Yes, sir.' He asked me, 'Paul, give me empty bottle.' So I went down, I give him bottle—he poured that from the glass in the bottle. He just took me in his own machine up to the station."

Your Honors will see at the outset, I hope, my idea and theory of entrapment. I TAKE IT TO BE THE LAW that to define the word to entrap, one may say that entrapment may be defined to be to ensnare, to catch by artifice, to involve in difficulties or distress, and the word "entrapment" may be declared to be synonymous with the words ensnare, inveigle, entangle or decoy.

I TAKE IT TO BE THE RULE OF LAW that where the criminal intent originates in the mind of the defendant that the fact that either the officers of the Government or the state used decoys or untruthful statements to furnish an opportunity for or to aid the accused in the commission of a crime, then the acts on the part of the officers would be no defense, but, on the other hand, if the accused never conceived any intention of committing the

offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, that their actions in that respect would be fatal to the prosecution and the accused would be entitled to a verdict of not guilty.

If the defendant is right as to the rule of the law, may I, with Your Honors' permission, follow the line of testimony undisputed in this record in order that Your Honors' may see my theory in this case.

This man came into Bakotich's place claiming to be sick.

> "He looks kind of sick to me, pale in the face. 'Why,' he says, 'Come on, Paul, give me a drink.' I asked him, I says, 'McGhee, this is two or three times this week you have come in to this place. I don't know what you mean. Now you better look out, don't come back, because you know very well we don't sell that stuff in this place. I never yet did sell one man, and I don't handle that stuff.' He says, 'Paul, please give me drink, because I am sick'; and you know so many times he is sick, and sick, and put his hand like this [illustrating]. 'Paul, please give me drink.' I say, 'McGhee, I aint got any. Get off me.' I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. 'Well, you don't know what happened to me

last night.' (Transcript of Record, pages 27 and 28.)

I'll call Your Honors' attention to the halting, broken English of the defendant. Nevertheless, through it appears his idea.

McGhee had come into his place two or three times prior to the date of the defendant's arrest. No man has denied the statement of Bakotich on the witness-stand:

> "I never yet did sell one man, and I don't handle that stuff." (Transcript of Record, page 27.)

Then McGhee begins, and may I be permitted, since this is an argument of entrapment and since I believe I am at least in accord with Webster's Unabridged Dictionary, to synonymize the word "entrap" with the word "ensnare," let me call Your Honors' attention to that more historic use of the word "ensnare" as Your Honors will find in the Book of Job in the thirty-fourth Chapter and the twenty-ninth and thirtieth verses:

> "Him who giveth quietness who then can make trouble? and him who hideth his face who then can behold him? whether it be done against a nation, or against a man only: That the hypocrite reign not, lest the people be *ensnared.*"

Let me direct Your Honors' minds back again to that scene in this man's place of business when McGhee tells him how sick he is and what happened last night:

"I says, 'I don't know—fight?' 'No,' he says, 'I went down on Astor Street, on some joint, and,' he said, 'I had about three hundred some odd dollars just come from the camp. I am clean broke.' (Transcript of Record, page 28.)

Seated in the position that Your Honors are, with knowledge as meager as Your Honors have of local conditions in small towns throughout the territory over which Your Honors must exercise your judicial control, the word "Astor Street" may mean little or it may mean much. To the sea-faring man, to the man who lives in Calloa, to the man who lives in San Francisco whose occupation is handling of sea-faring men and the knowledge of sea-faring men, the word "Astor Street" is known from South-of-the-Slot to the beach-comber on a Pacific island. It was as if Kipling had said:

> " Twas Fulta Fisher's boarding-house, where
> sailor men reside;
> And there were men from all the ports from
> Mississipp to Clyde."

What was the idea in McGhee's mind? It was to show that he, McGhee, had been in a resort—"joint" as he called it; that he was sick; that he had been robbed. What was the reaction in the mind of the defendant? It is true that were the defendant to come to my office and tell me that same story, I would send him possibly to the Red Cross or to organized charity for help. But among those men who have sailed and fished, there is at least this that can be said of them—their charity and their sympathy differs from us who live in a different strata of life.

Let me go on with the defendant's own words:

"So, to tell you the truth, I had a bottle a little bigger than this one, in my possession.

Q. What bottle is that?

A. This is pills from Dr. Matson.

Q. How big was the bottle you had?

A. Just a little bigger than this bottle. And I had this for myself, you know, some time when I feel bad. I can't help it, you see, I am sick sometimes. Doctor tells me no smoke. I tell him I don't smoke—I smoke right now. Dr. Matson tell me don't smoke for three years, and Dr. Matson sent order for doctor, so he give me order for the same pills, and no smoke, no drink whiskey. A friend of mine tell me, 'What are you looking for doctor? Whiskey is good for your sickness. Your lung is bad.' He says, 'It won't small hurt.' I am no drinker, that I was ever drunk in my life, or drink so much; but I just have used little bit, and have in my pocket when I feel so bad, I go in somewhere in back room to have a little bit. Last me about three drinks, to take that way. Little bigger bottle than this—about three drinks." (Transcript of Record, pages 28 and 29.)

I am willing to admit, if Your Honors' please, that the possession of this quantity of liquor might be *malum prohibitum,* but I deny that it was *malum in se.* I am not an advocate of the use of intoxicating liquor, but I challenge Your Honors in your own life

experiences to tell me there has never come the time or day that you have not seen honest men, possibly misinformed, who did not have the idea this ignorant fisherman had, that a small drink of whiskey was good for him.

The Government overlooks the fact that this man is a consumptive. Possibly never in your lifetimes have you seen those terrible paroxysms of coughing where the blood drips from the lips. Possibly in your lifetimes you have never seen those terrible heart attacks where a collapsed lung or broken down tissue ashens the face and the beads of perspiration drop from the forehead. There is no medical man who will deny the truth of this statement—that in such a situation whatever heart stimulant a man may have may ease off the "inevitable" hour. If Pasco Bakotich who had in his possession and for his own use, who had refused three times to sell intoxicating liquor to this man for money, came this snare, if you please, this entrapment, and if the words "entrap" and "ensnare" are synonymous, likewise with the word "entangle," then may I not say with Matthew:

> "Then went the Pharisees and took counsel how they might entangle him in his talk."

But to proceed:

> "Q. What did you do?
>
> A. Then I took out from my pocket, I seen him so sick, I thought to save his life. I know what sickness is." (Transcript of Record, page 29.)

No man can deny that

"He jests at wounds who never felt a scar."

When Pasco Bakotich said, "I know what sickness is," a voice rings down throughout the years back to the time of the One who came down from Samaria and fell among thieves.

I sometimes think, if it please Your Honors, and if I may digress for but a few lines, that with all the laws of *malum prohibitum* that if the Master Himself came back to Clatsop County and if the people here were again starving, and He cast His net into the great Columbia that lays before our door, in order that He might once more repeat the miracle of the fishes and the loaves, that in that event, after He had fed the multitude and He would sit down again with the disciples to hold again a Last Supper, He would find waiting outside an Astoria police officer with four warrants; the first one reading "Fishing without a license"; a second warrant reading "Fishing by an alien"; a third warrant reading "Catching small fish"; and a fourth if he turned the water into wine, of a violation of the prohibition law. And, if I might be allowed a slight suggestion, were a place on the Prohibition Staff vacant I know of no better prohibition agent, if history be an honest woman of her word, than Iscariot.

Let me proceed with the argument.

> "I said, 'Go ahead, McGhee.' Then he come out, went in his pocket. He says, 'Paul, I want you this, because, I know, of course, your money.' I say, 'No. That don't cost me money

at all. I didn't buy that. There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if want help go ahead. Take your money back, I don't want your money.' And I didn't take his money. So then he see that something is wrong, that I don't take it away from him. Then he don't want the drink. So he took it he went back from the door, just as he was himself about three or four feet, he took his gun out, he says, 'Stay where you are.' I put my hand like this—I say, 'I won't move.' I stood right up. (Transcript of Record, page 29.)

There is little comment necessary on that statement. It has never been denied at all—never been denied. It is what took place in Pasco Bakotich's life in his place of business, and no man has the effrontery nor had the effrontery to deny it.

"Chief of Police, about three minutes after, come in. He says, 'What have you got in your hand?' He says, 'There is whiskey; *Paul gave it to me.*' 'Is Paul under arrest?' 'Yes, sir.' He asked me, 'Paul, give me empty bottle.' So I went down, I give him bottle—he poured that from the glass in the bottle. He just took me in his own machine up to the station." (Transcript of Record, pages 29 and 30.)

If ever a police court case was dignified, at least this one was glorified.

What impression this argument may make upon your Honors I do not know. Had my client the

money or had I the opportunity I would love nothing better than to make the argument before this Court myself. I can only present it to Your Honors' attention as the cold, naked type shows the testimony.

If I were right in my requested instructions, if I am right in my exceptions to the Court's instructions, Your Honors will see the point as quickly as do I.

It is regrettable in this case that the defendant was not tried in his own town by those jurors who knew him. Since it is not in the record I do not care to discuss that portion of the case. Pasco Bakotich has lived twenty-six years in Astoria. He has never been convicted of a crime. He is sentenced to nine months' imprisonment. (Transcript of Record, pages 13 and 14.)

For your kindness in reading this brief I am grateful. If it is impossible for me to appear in person, I am indeed the loser, and I confidently await Your Honorable verdict in this case, which is appealed to you for your justice.

C. W. ROBINSON,
E. M. MORTON,
Attorneys for Plaintiff in Error.

No. 4354.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

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PASCO BAKOTICH,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

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# Brief of Defendant in Error

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Upon Writ of Error to the District Court of the United States for the District of Oregon.

JOHN S. COKE,
United States Attorney for the District of Oregon.

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Assistant United States Attorney for the District of Oregon.

For Defendant in Error.

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MILLAR E. McGILCHRIST,
Assistant United States Attorney for the District of Oregon.

For Defendant in Error.

## STATEMENT.

On the 21st day of November, 1923, an information was filed in the United States District Court for the District of Oregon, charging Pasco Bakotich with violation of Sections 3 and 21, of Title II, of the National Prohibition Act. The information contained three counts, Count One charging possession of a quantity of moonshine whiskey; Count Two charging him with sale of moonshine whiskey; and Count three charging him with maintaining a nuisance at 83 7th Street, in the City of Astoria, Oregon. On the 20th day of February, 1924, after trial by jury, said defendant was found guilty of all three counts.

Defendant has sued out a writ of error and has alleged, in support thereof, in his assignments of error that the Court erred in its refusal to give certain instructions requested by the defendant, pertaining to entrapment, set forth in the Transcript of Record on Pages 17 and 19, which instructions are as follows:

> "The Court instructs the jury that in cases where criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the state used decoys

or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that officers of the Government or of the city incited and by persuasion and misrepresentation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the sale of the said intoxicating liquor to the witness McGee." Defendant's Requested Instruction No. I.

"The Court instructs the jury that where the criminal intent originates in the mind of the entrapped person, and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be had though the criminality of the act is not affected by any question of consent, therefore if

> you find from the evidence in this case that the officer McGhee or any officer of the State of Oregon or of the city of Astoria lured or induced the defendant Pasco Bakotich to commit the offense charged in order to prosecute him therefor, then I instruct you that your verdict should be not guilty." Defendant's Requested Instruction No. II.;

and on the further grounds that the Court erred in its instructions to the jury with reference to the right in an officer to approach a person suspected of violating the law for the purpose of giving him an opportunity to sell him intoxicating liquor and comparing said conduct on the part of said officer with the placing of decoy letters in the United States mail for the purpose of catching persons suspected of transgressing the laws regulating the mails, which instruction is set forth on pages 37 and 38 of the Transcript of Record and is as follows:

> "Something has been said here about a decoy, or about the act of McGhee acting as a decoy, in order to induce this defendant to commit the offense with which he is charged here. A person, and a officer, has a perfect right, for the purpose of determining whether

crimes have been committed, to, as in this case, approach the person who is suspected and propose to purchase liquor of him. That is done every day. It is done with reference to the postoffice departments. An officer who is carrying the mails, for instance, is suspected of taking money in it, and at the end of the route it is found that the letter has been opened and the money taken out. The fact of putting the decoy letter in the mail is for the purpose of obtaining information as to whether the person suspected is transgressing the law. So, in this case, McGhee had a perfect right to go to this defendant and propose to buy liquor of him, for the purpose of determining and ascertaining whether or not the defendant was engaged in the business of selling liquor; and that is about all there is to that."

Defendant contends that as to the sale charged in the information and from the evidence adduced at the trial to prove said sale, he was entitled to have an instruction on the question of entrapment, and on that theory requested the instructions hereinbefore referred to, which the Trial Court re-

fused to give. No question is raised as to the sufficiency of the evidence to support the verdict of the jury. Nor is it contended that any error was committed by the Court in its instructions with reference to the evidence concerning the charge of possession of liquor or concerning the charge of maintaining a nuisance in violation of the National Prohibition Act.

There was testimony of other violation of the liquor laws by Bakotich introduced at the trial, which was allowed to go to the jury in support of the third count of the information, which evidence has not been set forth in this record, and which evidence was commented upon by the Court in his instructions on pages 36 and 37 of the transcript of record.

As to the possession, it was not controverted that the liquor found in the possession of the defendant was illegally possessed and there is nothing to disturb the verdict of the jury on that count of the information, since there has been no claim made that the Defendant was entrapped into the possession of the liquor which he possessed.

Bakotich was adjudged to pay a fine of $250, and sentenced to a term of nine months in the County Jail of Multnomah County, Oregon, no specific

penalty being given to any particular count in the information.

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## POINTS AND AUTHORITIES.

Requested instructions may be properly refused if there are no facts in the case to justify such instructions.

Coffin vs. U. S., 162 U. S. 664, 672.
Bird vs. U. S., 187 Fed. 118, 132.
Brown vs. U. S., 142 Fed. 1;' 73 CCA 187.

The refusal to give an instruction is not error where the omission to give said instruction is favorable to the defendant.

State vs. Cook, 117 La. 14; 41 S. 434.

Instructions may be properly refused if fully covered by the general charge of the Court.

Coffin vs. U. S., supra.
Hendrey vs. U. S., 23 Fed. 5, 18.

Acquittal on a charge of selling liquor is not inconsistent with conviction for maintaining a common nuisance by keeping a place where liquor was unlawfully kept for sale.

Panzich, et al. vs. U. S., 285 Fed. 871.

Bilboa vs. U. S., 287 Fed. 125.
Scribner vs. U. S., 2 Fed. (2d) 144.

## ARGUMENT.

The testimony of Earl McGhee, a police officer of the City of Astoria, discloses that said officer went to the soft drink saloon of Pasco Bakotich, which is located at 83 7th Street, Astoria, Oregon, on the 14th day of September, 1923, and while there purchased intoxicating liquor from Bakotich, for which he paid Bakotich fifty cents. After the sale was consummated, Bakotich was placed under arrest. The officer testified pertaining to the sale, in part as follows:

"Q. When did you first see Pasco Bakotich, the defendant in this case, Mr. McGhee?
A. Why, it was probably a couple of days before I made the purchase.
Q. A couple of days before what time?
A. The 14th of September.
Q. The 14th of September, 1923?
A. Yes.
Q. Where did you see him?
A. He was behind the **bar.**
Q. In what place?
A. In this same place.

Q. Describe this place.

A. It is 83 7th Street—I think is the number—City of Astoria.

Q. What county?

A. Clatsop County.

Q. What was he doing when you saw him as you remember, a few days before the 14th day of September, 1923?

A. Well, he was attending the duties ordinarily of a **bartender** in a place of that kind.

Q. What kind of a place is this 83 7th Street?

A. Well, what I know of the place it was a kind of a soft drinks, cigars, tobacco; also — —

Q. Well, we will come to the other business being conducted there. It is **ostensibly** then a soft drink place where soft drinks and cigars are being sold?

A. That is what it is generally known to be.

Q. And Pasco Bakotich on that date—that would be the 12th of September—was behind the **bar** when you first saw him?

A. Yes, sir.

Q. Since that time have you seen him in that place?

A. On September 14th.

Q. Now just tell the jury, Mr. McGhee, when you saw him on that date and where.

A. It was 11:15 in the morning September 14th, when I entered the place and ordered a drink of whiskey.

Q. From this defendant?

A. From Mr. Bakotich.

Q. All right. Just tell the jury what took place.

A. Well he served the drink. I tendered him the cash money for it.

Q. How much did you pay him?

A. I handed him a five-dollar bill.

Q. Yes.

A. And he rang it up in the cash register and gave me four fifty change. My drink was sitting on the **bar.**

Q. You may state, Mr. McGhee, where he secured the drink that he served to you.

A. Well, he had it in a container just under the top of the bar. He reached under the bar. I didn't see the transaction. I didn't see what he filled the glass out of. I didn't see the container. But he brought the glass out, set it on the bar in front of me."

The above evidence of Officer McGhee pertaining

to the sale of liquor disclosed that the officer went into this "soft drink parlor," ordered a drink of whiskey as a person would order a cigar and, without any hesitancy on the part of Bakotich, was served with a glass of moonshine whiskey for which he **paid** Bakotich fifty cents. The officer did no more, according to the theory of the Government's case and according to the testimony of the officer, than give the defendant an opportunity to commit a crime. The liquor was sold to the officer, according to his testimony, upon his bare request for a drink of whiskey. Bakotich's promptness in selling him the liquor corroborated the testimony of the other officers as to the reputation of this ostensible soft drink saloon commented upon in the instructions of the Trial Court on pages 36 and 37 as follows:

> "Now there has been testimony admitted here, Gentlemen of the Jury, tending in some way to show that the defendant had, prior to this time, either been dealing with intoxicants, or had them about his premises, or was exhibiting acts which would tend in some measure to show that he was engaged in the business of dispensing intoxicating liquor. I refer to the testimony of the Chief of Police and the

other officer who testified here. This testimony is not permitted to go to you for the purpose of proving the sale that was made on that date of September 14th; but it is admitted for the purpose of showing, if it has that effect, whether or not the defendant was maintaining and keeping a common nuisance."

The instruction of the Court with reference to the conduct of McGhee, to which the Defendant has taken exception, was a proper instruction and correctly stated the law and theory of the Government's case.

The only question to be considered on review is (first) whether, in view of the record the Defendant was entitled to the instructions in the form requested, and (second) whether or not he was entitled to any instructions whatsoever upon entrapment.

The instruction designated by counsel as Instruction I, which he requested and which is hereinbefore set forth, was not proper in form and was rightly refused by the Court. I refer particularly to that part of said instruction as follows:

> "If the accused never conceived any intention of committing the offense, **the fact** that officers of the Government or of the state incited and by persuasion and misrepresentation induced him to commit the offense charged in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the sale of the said intoxicating liquor to the witness McGhee."

This instruction assumes that the officers did incite, and by persuasion and misrepresentation induce said defendant to commit the offense charged in order to entrap, arrest and prosecute him therefor, instead of leaving the question to the jury as to whether or not that was done.

As to the second instruction, it appears that in a proper case, a defendant would be entitled to have said instruction given. In this case, however, the Court did not commit any error in refusing to give either of the instructions requested by the defendant. The requested instructions were not supported by the evidence or theory of the defense of Pasco Bakotich. He has not contended that he was en-

trapped or ensnared into the commission of any crime whatsoever. In fact, he denied that he had sold any liquor to the officer McGhee, but contended that he had given the liquor to McGhee because McGhee represented to him that he was sick. I refer to his testimony, which is in part as follows:

"Q. You heard McGhee testify. Just tell the jury —talk to them so they can hear you—how you saw McGhee, how long you have know McGhee, all about that incident.

A. Well, McGhee, beginning when he come in the place?

Q. Yes.

A. There was another friend of mine, kind of old man, working in logging camp, I was playing a game of pitch with him for cigar, and beat him two games. And McGhee come in alongside this man, and asked me for a drink. I say, 'What kind of drink do you want? What do you mean drink?' I say, 'What do you mean, drink? Soda water, water, or what do you want?' He looks kind of sick to me, pale in the face. 'Why,' he says, 'Come on, Paul, give me a drink.' I asked him, I says, 'McGhee, this is two or three times this week

you have come in to this place. I don't know what you mean. Now, you better look out, don't come back, because you know very well we don't sell that stuff in this place. I never yet did sell one man, and I don't handle that stuff.' He says, 'Paul, please give me a drink, because I am sick'; and you know so many times he is sick, and sick, and put his hand like this (illustrating). 'Paul, please give me a drink.' I say, 'McGhee, I ain't got any. Get off me.' I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. 'Well, you don't know what happened to me last night.'

Q. Who said that?

A. McGhee. He says, 'You don't know what happened to me last night.' I says, 'I don't know—fight?' 'No,' he says, 'I went down on Astor Street, on some joint, and,' he said, 'I had about three hundred some odd dollars, just come from the camp. I am clean broke.' So, to tell you the truth, I had a bottle a little bigger than this one, in my possession.

Q. What did you do?

A. Then I took out from my pocket, I seen him

so sick, I thought to save his life. I know what sickness is. And I poured it out in glass. I said, 'Go ahead, McGhee.' Then he come out, went in his pocket. He says, 'Paul, I want you this, because, **I know, of course, your money.'** I say, 'No. **That don't cost me money at all. I didn't buy that.** There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if you want help go ahead. **Take your money back, I don't want your money.' And I didn't take his money.**

A. After he asked me, and I give it to him, he took out money.

Q. What?

A. After I give him drink, he took out money. He says, 'Take it. Friend of mine gave me 50 cents. I don't want this for nothing. I know you don't get it for nothing yourself.' I says, 'No, I didn't pay for that.'

Q. They lied when they went on the stand and said that?

A. Yes. They are after me to sell moonshine, but I am not going to do it. They are after me, to make some money from me."

In view of the fact that the defendant, Bakotich,

denied that he had been entrapped into the commission of any crime, and claimed that he had given the liquor to the officer upon his solicitation, and made no claim that the officer had anything to do with his possession of the liquor, it would seem beyond any doubt that the instruction as given by the Trial Court covered the defendant's theory of the case. I refer to the instruction on page 39 of the transcript, which reads as follows:

> "Now, as to the sale, it seems that the immediate question as to whether a sale took place between the defendant and McGhee depends almost alone upon the testimony of McGhee and the defendant. They do not concur in what they say about it. The defendant says that he gave the liquor to McGhee. Of course, the Government, having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration, the count is not proven. But the question here, Gentlemen of the Jury, is for you to determine, as between these two men, which one is telling the truth. Is McGhee telling the truth when he says he paid 50 cents for this liquor; or is the defendant telling the

> truth when he says that he gave the liquor to McGhee? You may take into consideration all the circumstances surrounding the entire transaction—what was done and said there, and the probabilities of the fact, and determine for yourselves whether or not, beyond a reasonable doubt, the Government has established the fact, as alleged, that the defendant sold liquor, intoxicating liquor, or moonshine, to the plaintiff."

The Trial Court told the jury that if they believed the defendant's testimony concerning the giving of the liquor to McGhee, as he had contended, they should acquit him of the second count in the indictment. The Court stated that the "Government, having alleged a sale, must prove a sale, and if the defendant gave the liquor to McGhee without a consideration, the count is not proven." Such an instruction by the Court is more favorable to the defendant than the instruction requested by him, and is more applicable to the theory of the defendant's defense than the instruction of entrapment requested, and the failure to give said instructions cannot be said to be prejudicial to the defendant, in view of the instruction given by the Court on that point.

In any event, a reversal in this case as to Count

II, alleging the sale of intoxicating liquor, for error committed by the Trial Court would not affect the verdict of the jury as to Counts I and III charging the possession of intoxicating liquor and maintaining a common nuisance in violation of the National Prohibition Act, nor the judgment of the Court, in view of the fact that the sentence of nine months and $250 could have been imposed as a judgment upon a conviction on Counts I and III.

I quote from the decision of Judge Hunt in the case of Panzich vs. United States, supra, as follows:

> We find no merit in the second assignment, that, inasmuch as Mary Panzich was acquitted of the charge of an unlawful sale, the verdict of guilty of maintaining a common nuisance cannot stand against her. Acquittal of making a sale is not inconsistent with guilt of keeping a place where the purpose is to sell and barter. That no business is done is immaterial, if the place is kept for the purpose of doing business."

Respectfully submitted.

JOHN S. COKE,
United States Attorney for the
District of Oregon.

MILLAR E. McGILCHRIST,
Assistant United States Attorney for
the District of Oregon.

No. 4355

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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CHARLES FORNI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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# Transcript of Record.

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**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.**

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

PRESTON & DUNCAN, Esqs., Hobart Bldg., San Francisco, Cal., H. S. YOUNG, Esq., R. G. HUDSON, Esq., for Defendant and Plaintiff in Error.

UNITED STATES ATTORNEY, San Francisco, California.

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,

Defendants.

## PRAECIPE FOR TRANSCRIPT ON WRIT OF ERROR.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record to be used on writ of error in the above-entitled cause and include therein the following:

1. Information.
2. Arraignment.
3. Plea of defendant, Charles Forni.

4. Petition for return of personal property (Commissioner's No. 1389); affidavit in support thereof; answer of Government thereto and affidavit in support of said answer; order to show cause; order submitting said petition and order denying the same.
5. Petition for exclusion of evidence; affidavit in support thereof; answer of Government thereto and affidavit in support thereof; order submitting said petition; and order denying the same.
6. Record of trial.
7. Verdict of jury.
8. Judgment of Court.
9. Clerk's certificate to judgment-roll.
10. Petition for writ of error.
11. Assignment of errors. [1*]
12. Citation on writ of error.
13. Return thereto.
14. Order allowing writ of error and supersedeas.
15. Cost bond on appeal.
16. Bill of exceptions.
17. Writ of error (original).
18. Admission of service of citations on writ of error.
19. Admission of service of writ of error.
20. Stipulation extending time on bill of exceptions.
21. This praecipe.

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*Page-number appearing at foot of page of original certified Transcript of Record.

22. Clerk's certificate to transcript of record.

PRESTON & DUNCAN,
H. S. YOUNG,
R. G. HUDSON,
Attorneys for Defendant, Charles Forni.

Due service and receipt of a copy of the within admitted this 30 day of Sept., 1924.

STERLING CARR,
Attorney for (Plaintiff).

[Endorsed]: Filed Sep. 30, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[2]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. (13,126).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

INFORMATION.

At the March term of said Court in the year of our Lord one thousand nine hundred and twenty-three,—

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green,

Special Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 21st day of March, 1923, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: THAT

CHARLES FORNI and GEORGE BLAKE,

hereinafter called the defendants, heretofore, to wit, on or about the 26th day of December, 1922, at 2933 Webster St., in the city and county of San Francisco, in the Southern Division [3] of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises aforesaid, certain intoxicating liquor, to wit: 25 cases of Scotch whiskey; 5–50 gal. bbls. of whisky; 1–50 gal. bbl. of whisky, containing about 4 in. in the bottom; 1–50 gal. bbl. part full of sherry wine; 18–50 gal. bbls. red wine; 2–175 gal. puncheons of red wine; 1–10 gal. bbl. of alcohol; 2–50 gal. bbls. of grape brandy; 11–5 gal. jugs of

wine; 93 qt. bottles of red wine; 1–2 gal. jug white wine; 15 empty bbls., then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof. [4]

NOW, THEREFORE, your informant presents: that Charles Forni and George Blake, hereinafter called the defendants, heretofore, to wit, on or about the 26th day of December, 1922, at 2933 Webster St., in the city and county of San Francisco, in the Southern Division of the Northern District

of California, and within the jurisdiction of this court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit: 25 cases of Scotch whisky; 5–50 gal. bbls. of whisky, 1–50 gal. bbl. of whisky, containing about 4 in. in the bottom; 1–50 gal. bbl. part full of sherry wine; 18–50 gal. bbls. red wine; 2–175 gal. puncheons of red wine; 1–10 gal. bbl. of alcohol; 2–50 gal. bbls. of grape brandy; 11–5 gal. jugs of wine; 93 qt. bottles of red wine; 1–2 gal. jug of white wine; 15 empty gallon barrels, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Special Asst. United States Attorney. [5]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

I. H. Cory, being first duly sworn, deposes and

says: that Charles Forni and George Blake, on or about the 26th day of December, 1922, at 2933 Webster St., city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there maintain a common nuisance in that the said defendants did then and there keep for sale on the premises at 2933 Webster St., aforesaid, certain intoxicating liquor, to wit: 25 cases of Scotch whisky; 5–50 gal. bbls. of whisky, 1–50 gal. bbl. of whisky, containing about 4 in. in the bottom; 1–50 gal. bbl. part full of sherry wine; 18–50 gal. bbls. red wine; 2–175 gal. puncheons of red wine; 1–10 bbl. of alcohol; 2–50 gal. bbls. of grape brandy; 11–5 gal. jugs of wine; 93 qt. bottles of red wine; 1–2 gal. jug of white wine; 15 empty gallon bbls., then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: that Charles Forni and George Blake, on or about the 26th day of December, 1922, at 2933 Webster St., city and county of San Francisco, in the Southern Division of [6] the Northern District of California, and within the jurisdiction of this court, did then and there possess certain intoxi-

cating liquor, to wit: 25 cases of Scotch whisky; 5–50 gal. bbls. of whisky; 1–50 gal. bbl. of whisky, containing about 4 in. in the bottom; 1–50 gal. bbl. part full of sherry wine; 18–50 gal. bbls. red wine; 2–175 gal. puncheons of red wine; 1–10 gal. bbl. of alcohol; 2–50 gal. bbls. of grape brandy; 11–5 gal. jugs of wine; 93 qt. bottles of red wine; 1–2 gal. jug of white wine; 15 empty gallon bbls., then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

I. H. CORY.

Subscribed and sworn to before me this 20th day of March, 1923.

[Seal] C. M. TAYLOR,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 20, 1923. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [7]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 2d day of April, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,126.

UNITED STATES OF AMERICA

vs.

CHARLES FORNI et al.

MINUTES OF COURT—APRIL 2, 1923—ARRAIGNMENT AND PLEA.

This case came on regularly for arraignment of defendant Charles Forni, who was present with his attorney. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Said defendant was duly arraigned upon information filed herein, stated true name to be as contained therein, waived formal reading thereof and thereupon plead "Not Guilty" of offense charged, which plea the Court ordered and the same is hereby entered. On motion of Mr. Fink, further ordered trial set for Apr. 19, 1923. [8]

In the District Court of the United States, in and for the Northern District of the State of California, First Division.

CHARLES FORNI,

Plaintiff,

vs.

SAMUEL RUTTER, as the Duly Qualified and Acting Prohibition Director for the State of California, and D. W. RINCKEL, JOHN DOE and RICHARD ROE, His Agents,

Defendants.

## PETITION FOR RETURN OF PERSONAL PROPERTY.

To the Honorable the Above-entitled Court.

The petition of Charles Forni respectfully shows that the said Samuel Rutter now is and was at all times herein mentioned the duly qualified and acting Prohibition Director for the State of California, and that at all times herein mentioned the above-named D. W. Rinckel, John Doe and Richard Roe, were the duly authorized and acting agents of said Samuel Rutter, as such Prohibition Director. That the true names of the defendants John Doe and Richard Roe are unknown to petitioner and that upon ascertaining the same said petitioner will move this Court for an order amending this petition accordingly.

I.

That he is now and was at all times herein men-

tioned the owner of and entitled to the immediate possession of the following described personal property, to wit: [9]

25 cases of Scotch whisky.
5–50 gallon bbls. of whisky.
1–50 gallon bbl. of whiskey containing about 4 in. in the bottom.
1–50 gallon bbl. part full of sherry wine.
18–50 gallon bbls. of red wine.
2–175 puncheons of red wine.
1–10 gallon bbl. of alcohol.
1–5 gallon can of alcohol.
2–50 gallon bbls. of grape brandy.
11–5 gallon jugs of wine.
93 quart bottles of red wine.
1–2 gallon jug of white wine.
15 empty gallon bbls.
1 Hydrometer and glass tube.

II.

That on the 26th day of December, 1922, Samuel Rutter as the duly qualified and acting Prohibition Director for the State of California, thru his agents, D. W. Rinckel, John Doe and Richard Roe, entered the private dwelling-house of petitioner, situate on the premises known as 2933 Webster Street, San Francisco, California, and seized and carried away therefrom the said personal property for an alleged violation of the so-called National Prohibition Act of the statutes of the United States, to wit: Possession by petitioner of said personal property without evidence of a tax having been paid thereon.

III.

That at the time said personal property was seized as aforesaid, and that at all times on the 26th day of December, 1922, that the said premises together with the outhouse in the rear of the said premises were actually occupied by your petitioner as his private dwelling-house.

IV.

Petitioner is informed and believes, and therefore alleges that the United States Government proposes to destroy said personal property, and that said personal property will [10] be destroyed by said United States Government unless the same is returned to petitioner.

WHEREFORE, petitioner prays that an order be made directing said Samuel Rutter as such Prohibition Director for the State of California, and said D. W. Rinckel, John Doe and Richard Roe, his agents, and John T. Williams as United States Attorney for the Northern District of California, and each of them to appear before the above-entitled Court to show cause, if any they have, why the said personal property should not be returned to petitioner and that upon the hearing of this petition that said *personal be* returned to your petitioner.

CHARLES FORNI,
Petitioner.

H. S. YOUNG,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Charles Forni, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters therein alleged on his information and belief, and as to those matters he believes them to be true.

CHARLES FORNI.

Subscribed and sworn to before me this 6th day of March, 1923.

[Seal] JENNIE DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California. [11]

[Endorsed]: Filed Mar. 13, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

## AFFIDAVIT IN SUPPORT OF PETITION FOR RETURN OF PERSONAL PROPERTY.

Charles Forni, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action.

That on the 26th day of December, 1922, by virtue of an affidavit for that purpose made by one D. W. Rinkle, a certain search-warrant was issued by Hon. Thomas E. Hayden, United States Commissioner for the Northern District of California, by virtue of which the premises therein described were entered and searched and by virtue of which the personal property described in the petition for the return therefor now pending in the above-entitled proceeding, was seized and taken from the premises of affiant, who at said time was and now is the owner thereof.

That on said 26th day of December, 1922, and for a period of about three years thereto affiant and his [13] brother, Louis Forni, actually resided upon said premises and that on said date and for a period of about three years prior thereto affiant and his brother actually occupied the entire premises described in said search-warrant as their private dwelling-house and for no other purpose or purposes.

That said premises consists of a certain two-story frame building and the basement thereof and an outhouse as shed about 30 feet directly in the rear

of said building and which cannot be seen from said Webster Street.

That said building and said shed are within a common enclosure.

That said basement and said shed from time to time during said period, and in particular on the said 26th day of December, 1922, were used by affiant and his said brother for the purpose of therein storing, in addition to said property seized as aforesaid, their personal effects such as furniture, clothing, pictures and the automobile of affiant.

That said D. W. Rinkle gained access to said shed by scaling a wall surrounding same.

That any and every visit made by said D. W. Rinkle to said premises and any and every search thereof and any and every seizure of any property therefrom was without the consent of and against the will of affiant.

CHAS. FORNI.

Subscribed and sworn to before me this 2d day of July, 1923.

[Seal] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California. [14]

[Endorsed]: Filed Jul. 10, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

In the District Court of the United States, for the Northern District of the State of California, First Division.

CHARLES FORNI,

Plaintiff,

vs.

SAMUEL RUTTER, as the Duly Qualified and Acting Prohibition Director for the State of California, and D. W. RINCKEL, JOHN DOE and RICHARD ROE, His Agents,

Defendants.

ORDER TO SHOW CAUSE.

Upon the reading and filing in the office of the clerk of the above-entitled court, the petition of Charles Forni for the return to petitioner of said personal property in said petition described, and upon motion of H. S. Young, attorney for said petitioner, and good cause appearing therefor,—

IT IS HEREBY ORDERED that Samuel Rutter, as such Prohibition Director for the State of California, and D. W. Rinckel, John Doe, Richard Roe, his agents, and John T. Williams, as United States Attorney for the Northern District of California, be and each of them appear before the above-entitled court, on the 22d day of March, 1923, at the hour of ten o'clock A. M. of said day then and there to show cause, if any they have, why said personal property should not be returned to said petitioner, and

It is further ordered that a copy of said petition together with a copy of this order be served upon said Samuel [16] Rutter, as Prohibition Director for the State of California, and D. W. Rinckle, his agents, and John T. Williams, as United States Attorney for the Northern District of California, on or before the 17th day of March, 1923.

Dated: March 14, 1923.

R. S. BEAN,
Judge of Said District Court.

[Endorsed]: Filed Mar. 14, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

ANSWER TO PETITION FOR RETURN OF PERSONAL PROPERTY.

Comes now, the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel

F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that the Prohibition Agents or either or any of them entered the private dwelling-house of petitioner and therein seized and carried away or therein seized or carried away any of the personal property mentioned and described in petitioner's petition herein, but in this connection alleges the fact to be that the said Prohibition Agents entered a garage and an outbuilding or shed, each of which was disconnected from the dwelling-house of petitioner herein.

Denies that the said petitioner is entitled to have the said intoxicating liquor mentioned and described in petitioner's petition herein returned to him, and in this connection alleges the facts to be as set out in the affidavit of D. W. Rinckel which said affidavit is hereto attached, made part hereof, and marked Exhibit "A," to the same effect as if the same were herein again set out in full. [18]

WHEREFORE respondent prays that said petition be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. U. S. Attorney,
Attorneys for Plaintiff. [19]

EXHIBIT "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,

Defendants.

AFFIDAVIT IN OPPOSITION TO PETITION FOR RETURN OF PERSONAL PROPERTY.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

D. W. Rinckel, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a Federal Prohibition Agent, and acting as such under the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That there is, and at all of the times herein mentioned was a building located at No. 2933 Webster Street in the said city and county of San Francisco; that underneath the said building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress therefrom to any other portion of the building; and

that the main entrance into the said garage is on and from the said Webster St.

That prior to the 26th day of December, 1922, affiant and other Prohibition Agents had reliable information that intoxicating liquor, to wit, whisky, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, was stored, sold and delivered from the garage herein above mentioned as being underneath the building at No. 2933 Webster [20] Street in said city and county of San Francisco.

That pursuant to said information and on the 26th day of December, 1922, affiant and another Prohibition Agent went to the said premises, and affiant looking through an open door saw in plain sight in said garage about twenty-five cases of intoxicating liquor, to wit, Scotch whisky, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, which said intoxicating liquor in the said garage was in cases and which said cases were marked: "D. T. Company, Vancouver, B. C.," the said 25 cases each containing 12 bottles. That the said intoxicating liquor was untax paid and contained no Internal Revenue Stamps whatever. That on the rear of said premises in a shed affiant then and there saw through an open door: five 50-gallon barrels of intoxicating liquor, to wit, whisky; one fifty-gallon barrel containing approximately five gallons of intoxicating liquor, to wit, whisky, one 50-gallon barrel half full of intoxicating liquor, to wit, sherry wine, eighteen fifty-gallon barrels of in-

toxicating liquor, to wit, red wine, one 10-gallon barrel of intoxicating liquor, to wit, alcohol, one 5-gallon can of intoxicating liquor, to wit, alcohol, two *fifty barrels* of intoxicating liquor, to wit, grape brandy, eleven 5-gallon jugs of intoxicating liquor, to wit, wine, 93 quart bottles of intoxicating liquor, to wit, red wine and one 2-gallon jug of intoxicating liquor, to wit, white wine, all of which said intoxicating liquor then and there contained one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes; and fifteen empty 50-gallon barrels, one hydrometer and one glass gauge tube.

That thereafter, and on the said 26th day of December, 1922, affiant secured a search-warrant based upon the above facts, and with said search-warrant entered the said garage and seized the said intoxicating liquor therein, to wit, the said twenty-five cases of intoxicating liquor, and entered the said shed and then [21] and there seized the intoxicating liquor heretofore listed as being contained therein. That all of the said barrels, including those that contained liquor as well as the empty barrels, were marked "Vancouver, B. C.," and all of said intoxicating liquor including the said empty barrels and hydrometer and glass gauge, are now in the possession of Samuel F. Rutter as Prohibition Director in and for the State of California.

That affiant did not, nor did any of the other Prohibition Agents present at any time enter the dwelling of the said defendant. That affiant saw intoxicating liquor in the residence of the said defendant, but affiant did not, nor did any of the other

Prohibition Agents search for, seize or attempt to seize any of the intoxicating liquor in the said residence of the said defendant.

That at the time of the search and seizure under the said search-warrant affiant then and there arrested one of the defendants herein, to wit, George Blake, for a violation of the said National Prohibition Act, and the said George Blake then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That thereafter on said 26th day of December, 1922, approximately one-half hour after the above said arrest, the defendant, Charles Forni, came to said premises and affiant then and there arrested the said defendant for a violation of the said National Prohibition Act, and the said Charles Forni, then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That at all times herein mentioned said liquor was illicit and contraband.

That thereafter, and heretofore an information was filed charging the said George Blake and Charles Forni with having in their possession the above-mentioned intoxicating liquor, all of which then and there contained one-half of one per cent and more of alcohol by volume and then and there fit for use for beverage purposes.

D. W. RINCKEL.

Subscribed and sworn to before me March 21, 1923.

C. M. TAYLOR. [22]

[Endorsed]: Filed Mar. 21, 1923. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [23]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 15th day of September, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 1389.

(U. S. Commissioner Case.)

UNITED STATES OF AMERICA

vs.

CHARLES FORNI.

MINUTES OF COURT—SEPTEMBER 15, 1923—ORDER DENYING MOTION TO RETURN PROPERTY.

After hearing attorneys for respective parties, ordered motion for return of personal property denied. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,

Defendants.

## PETITION TO EXCLUDE EVIDENCE.

To the Honorable, the Above-entitled Court:

The petition of Charles Forni respectfully shows:

That Samuel F. Rutter is and was at all of the times herein mentioned the duly qualified and acting Prohibition Director of the State of California, and that at all times herein mentioned D. W. Rinckel, John Doe and Richard Roe were and are the duly authorized and acting agents of said Samuel F. Rutter as such Prohibition Director; that the true names of said John Doe and Richard Roe are unknown to petitioner and that said names are fictitious and that upon ascertaining the same petitioner will move this Court for an order amending this petition accordingly.

That he is now and was at all times herein mentioned the owner of and entitled to immediate possession of the following described personal property, to wit:

25 cases of Scotch whiskey.
5–50 gallon bbls. of whisky.
1–50 gallon bbl. of whiskey containing about 4 in. in the bottom.
1–50 gallon bbl. part full of Sherry wine. [25]
18–50 gallon bbls. of red wine.
2–175 gallon puncheons of red wine.
1–10 gallon bbl. of alcohol.
1–5 gallon can of alcohol.
2–50 gallon bbls. of grape brandy.
11–5 gallon jugs of wine.
93 quart bottles of red wine.
1–2 gallon jug of white wine.
15 empty gallon bbls.
1 hydrometer and glass tube.

That on the 26th day of December, 1922, said Samuel F. Rutter, as such Prohibition Director, through his agents, D. W. Rinckel, John Doe and Richard Roe, unlawfully entered the private dwelling of petitioner situate in and upon the premises known as No. 2933 Webster Street, San Francisco, California, and unlawfully seized and carried away therefrom the said personal property for an alleged violation of the so-called National Prohibition Act, to wit, the unlawful possession by your petitioner of intoxicating liquors.

That at the time said personal property was seized as aforesaid and at all times on the 26th day of December, 1922, the said premises, together with the outhouse in the rear of the same, were actually occupied by your petitioner as his private dwelling-house; that said search and said seizure

were made in violation of the rights secured to your petitioner by virtue of the Fourth and Fifth Amendments to the Constitution of the United States of America and Section 25 of the National Prohibition Act, all of which is more particularly set forth in Exhibit "A," which is attached hereto and made part hereof.

That upon the trial of the above-entitled action United States of America intends to and will use, unless prohibited by an order of this Court, said personal property in evidence against your petitioner.

WHEREFORE, your petitioner prays that an order be made prohibiting the United States of America from introducing said [26] personal property in evidence at the trial of said action.

CHARLES FORNI,
Petitioner.

FRANK T. O'NEILL,
H. S. YOUNG,
Attorneys for Petitioner. [27]

EXHIBIT "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

## AFFIDAVIT IN SUPPORT OF PETITION FOR RETURN OF PERSONAL PROPERTY.

State of California,
City and County of San Frncisco,—ss.

Charles Forni, being first duly sworn deposes and says:

That he is one of the defendants in the above-entitled action,

That on the 26th day of December, 1922, by virtue of an affidavit for that purpose made by one D. W. Rinckel, a certain search-warrant was issued by Hon. Thomas E. Hayden, United States Commissioner for the Northern District of California, by virtue of which the premises therein described were entered and searched and by virtue of which the personal property described in the petition to include evidence on file in the above-entitled action, was seized and taken from the premises of affiant, who at said time was and now is the owner thereof.

That on said 26th day of December, 1922, and for a period of about three years thereto affiant and his brother, Louis Forni, actually resided upon said premises and that on said date and for a period of about three years prior thereto affiant and his [28] brother actually occupied the entire premises described in said search-warrant as their private dwelling-house and for no other purpose or purposes; and that said premises were never used in whole or in part for any business purpose and that

no sale of intoxicating liquors was ever made therein.

That said premises consists of a certain two-story frame building and the basement thereof and an outhouse or shed about 30 feet directly in the rear of said building and which cannot be seen from said Webster Street.

That said building and said shed are within a common enclosure.

That said basement and said shed from time to time during said period, and in particular on the said 26th day of December, 1922, were used by affiant and his said brother for the purpose of therein storing, in addition to said property seized as aforesaid, their personal effects such as furniture, clothing, pictures and the automobile of affiant.

That said D. W. Rinckel, John Doe and Richard Roe gained access to said shed by scaling a wall surrounding same.

That any and every visit made by said D. W. Rinckel, John Doe and Richard Roe, to said premises and any and every search thereof and any and every seizure of any property therefrom was without the consent of and against the will of affiant and his said brother.

CHARLES FORNI.

Subscribed and sworn to before me this 7th day of April, 1924.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [29]

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At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 10th day of April, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,126.

UNITED STATES OF AMERICA

vs.

CHARLES FORNI and GEORGE BLAKE.

MINUTES OF COURT—APRIL 10, 1924—TRIAL.

This case came on regularly this day for trial of defendants upon information filed herein against them. Defendant Charles Forni was present with his attorneys. Defendant George Blake was absent. J. F. McDonald, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Court ordered that trial proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, ex-

amined, and accepted, were duly sworn as jurors to try this case, viz.:

| | |
|---|---|
| Thos. H. Fallon, | W. V. Harrington. |
| B. F. Bickel, | Granville D. Abbott. |
| Adolph C. Boldeman. | H. J. Brown, |
| C. L. McFarland, | Edson F. Adams, |
| W. T. Dickerman. | John A. Keating. |
| Theophilus Allen. | W. E. Amann. |

Mr. McDonald made a statement to the Court and jury as to the nature of the case and called Mr. Rinckel, who was duly sworn and examined for United States, and rested.

Attorney for defendant moved the Court for order excluding evidence, which motion the Court ordered denied. Defense then called Enrico Pasozzi and S. Forni, who were each sworn and examined for defense, and rested. [30]

Case was then argued by counsel for respective parties and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being so instructed, retired at 2:40 P. M. to deliberate upon a verdict, and subsequently returned into court at 3:35 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict which the Court ordered filed and recorded, viz.:

"We, the jury, find the defendants at the bar as follows: Charles Forni Guilty on 1st Count and

Guilty on 2d Count, George Blake Guilty on 1st Count and Guilty on 2d Count.

JOHN A. KEATING,
Foreman."

Court ordered that writ of attachment issue for arrest and appearance of defendant George Blake, returnable May 8, 1924, and that his bond heretofore given in this case be and the same is hereby forfeited. Ordered matter of judgment as to said defendant George Blake continued to May 8, 1924.

Defendant Charles Forni was then called for judgment, duly informed by the Court of the nature of the information filed herein, of his arraignment, plea, trial, and the verdict of the jury. Defendant was then asked if he had any legal cause to show why judgment should not be entered herein and thereupon attorney for defendant made a motion for new trial, which motion the Court ordered denied. Said attorney then made a motion in arrest of judgment, which motion the Court likewise ordered denied. Thereupon, no sufficient cause appearing why judgment should not be pronounced, the Court ordered that defendant Charles Forni, for offense of which he stands convicted, be imprisoned for period of one (1) year in the county jail, county of San Francisco, State of California, and that he pay a fine in sum of Five Hundred [31] ($500.00) Dollars as to First Count and *ine* in sum of Five Hundred ($500.00) Dollars as to Second Count of information, or, in default of payment of said fine, defendant be further imprisoned until said fine is paid or he be otherwise

discharged by due process of law. Further ordered that defendant stand committed to custody of U. S. Marshal to execute said judgment, and that a commitment issue. [32]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,
Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, the United States Attorney in and for the Northern District of California, did file in the above-entitled court an information against the defendant, Charles Forni, and that, thereafter, the said Charles Forni appeared in court and upon being called to plead to said information, pleaded not guilty as shown by the records herein.

AND BE IT FURTHER REMEMBERED that the defendant, Charles Forni, who will hereinafter be called the defendant, having duly pleaded not guilty and the cause being at issue, the same coming on for trial on the 10th day of April, 1924, before

the Honorable John S. Partridge, Judge of the above-entitled court, and a jury impanelled, the United States being represented by the Hon. John T. Williams, United States Attorney, and J. Fred McDonald, Esq., Assistant United States Attorney, and the defendant being represented by Roy G. Hudson, Esq., and Frank T. O'Neill, Esq.

That after the arrest of the defendants herein and on or about Mar. 13, 1923, and prior to the filing of the information against them, the defendant Charles Forni caused to be filed in the above-entitled court a petition for the return of certain personal property seized at or about the time of his arrest; that said petition is in words and figures as follows, to wit: [33]

In the District Court of the United States, in and for the Northern District of the State of California, First Division.

(Commissioner Case No. 1389.)

CHARLES FORNI,

Plaintiff,

vs.

SAMUEL RUTTER, as the Duly Qualified and Acting Prohibition Director for the State of California, and D. W. RINCKEL, JOHN DOE, and RICHARD ROE, His Agents,

Defendants.

## PETITION FOR RETURN OF PERSONAL PROPERTY.

To the Honorable, the Above-entitled Court:

The petition of Charles Forni respectfully shows that the said Samuel Rutter now is and was at all times herein mentioned the duly qualified and acting Prohibition Director for the State of California, and at all times herein mentioned the above-named D. W. Rinckel, John Doe, and Richard Roe were the duly authorized and acting agents of said Samuel Rutter, as such Prohibition Director; that the true names of the defendants John Doe and Richard Roe are unknown to petitioner and that upon ascertaining the same said petitioner will move this Court for an order amending this petition accordingly.

I.

That he is now and was at all times herein mentioned the owner of and entitled to the immediate possession of the following described personal property, to wit:

25 cases of Scotch whiskey.
5– 50 gallon bbls. of whiskey.
1– 50 " bbl. of whiskey containing about 4 in the bottom.
1– 50 gallon bbl. part full of Sherry wine.
18– 50 " bbls. of red wine.
2–175 " Puncheons of red wine.
1– 10 " bbl. of alcohol.
1– 5 " can of alcohol.

2– 50 " bbls. of grape brandy.
11– 5 " jugs of wine. [34]
93 quart bottles of red wine.
1–2 gallon jug of white wine.
15 empty gallon bbls.
1 hydrometer and glass tube.

II.

That on the 26th day of December, 1922, Samuel Rutter, as the duly qualified and acting Prohibition Director for the State of California, through his agents, D. W. Rinckel, John Doe and Richard Roe, entered the private dwelling-house of petitioner situate on premises known as 2933 Webster Street, San Francisco, California, and seized and carried away therefrom the said personal property for an alleged violation of the so-called National Prohibition Act of the statutes of the United States, to wit: Possession by petitioner of said personal property without evidence of a tax having been paid thereon.

III.

That at the time said personal property was seized as aforesaid, and that at all times on the 26th day of December, 1922, that the said premises together with the outhouse in the rear of the said premises were actually occupied by your petitioner as his private dwelling-house.

IV.

Petitioner is informed and believes, and therefore alleges that the United States Government proposes to destroy said personal property, and that said personal property will be destroyed by said United

States Government unless the same is returned to petitioner.

WHEREFORE, petitioner prays that an order be made directing said Samuel Rutter as such Prohibition Director for the State of California, and said D. W. Rinckel, John Doe and Richard Roe, his agents, and John T. Williams as United States Attorney for the Northern District of California, and each of them to appear before the above-entitled court to show cause, if any they have, why the said personal property should not be returned [35] to your petitioner.

CHARLES FORNI,
Petitioner.

H. S. YOUNG,
Attorney for Petitioner.

[Endorsed]: Filed Mar. 13, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [36]

State of California,
City and County of San Francisco,—ss.

Charles Forni, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition and that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to such matters therein alleged on information and belief and as to those matters he believes them to be true.

CHARLES FORNI.

Subscribed and sworn to before me this 6th day of March, 1923.

JENNIE DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 13, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

That in support of said petition for the return of personal property, said defendant filed his affidavit in support thereof, which affidavit is in words and figures as follows, to wit: [37]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(No. 1389.—Commr.)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

AFFIDAVIT IN SUPPORT OF PETITION FOR RETURN OF PERSONAL PROPERTY.

Charles Forni, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action.

That on the 26th day of December, 1922, by virtue of an affidavit for that purpose made by one D. W. Rinkle, a certain search-warrant was issued by Hon. Thomas E. Hayden, United States Commissioner for the Northern District of California, by virtue of which the premises therein described were entered and searched and by virtue of which the personal property described in the petition for the return therefor now pending in the above-entitled proceeding, was seized and taken from the premises of affiant, who at said time was and now is the owner thereof.

That on said 26th day of December, 1922, and for a period of about three years thereto affiant and his brother, Louis Forni, actually resided upon said premises and that on said date and for a period of about three years prior thereto affiant and his brother actually occupied the entire premises described in said search-warrant as their private dwelling-house and for no other purpose or purposes.

That said premises consist of a certain two-story frame building and the basement thereof and an outhouse as shed about 30 feet directly in the rear of said building and which cannot be [38] seen from said Webster Street.

That said building and said shed are within a common enclosure.

That said basement and said shed from time to time during said period, and in particular on the said 26th day of December, 1922, were used by affiant and his said brother for the purpose of therein

storing, in addition to said property seized as aforesaid, their personal effects such as furniture, clothing, pictures and the automobile of affiant.

That said D. W. Rinkle gained access to said shed by scaling a wall surrounding same.

That any and every visit made by said D. W. Rinkle to said premises and any and every search thereof and any and every seizure of any property therefrom was without the consent of and against the will of affiant.

CHAS. FORNI.

Subscribed and sworn to before me this 2d day of July, 1923.

[Seal] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 10, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

That upon considering said petition the Hon. R. S. Bean, Judge of the United States District Court for the Northern District of California, Southern Division, caused an order to show cause to issue, which said order to show cause is in words and figures as follows, to wit: [39]

In the District Court of the United States, for the Northern District of the State of California, First Division.

(Commr. Case No. 1389.)

CHARLES FORNI,

Plaintiff,

vs.

SAMUEL RUTTER, as the Duly Qualified and Acting Prohibition Director for the State of California, and D. W. RINCKEL, JOHN DOE, and RICHARD ROE, His Agents,

Defendants.

ORDER TO SHOW CAUSE.

Upon the reading and filing in the office of the Clerk of the above-entitled court, the petition of Charles Forni for the return to petitioner of said personal property in said petition described, and upon motion of H. S. Young, attorney for said petitioner, and good cause appearing therefor:

It is hereby ordered that Samuel Rutter, as such Prohibition Director for the State of California, and D. W. Rinckel, John Doe, Richard Roe, his agents, and John T. Williams, as United States Attorney for the Northern District of California, be and each of them appear before the above-entitled court on the 22d day of March, 1923, at the hour of ten o'clock A. M. of said day then and there to show cause, if any they have, why said personal

property should not be returned to said petitioner, and

It is further ordered that a copy of said petition together with a copy of this order be served upon said Samuel Rutter, as Prohibition Director for the State of California, and D. W. Rinckel, his agents, and John T. Williams, as United States Attorney for the Northern District of California, on or before [40] the 17th day of March, 1923.

Dated: March 14th, 1923.

R. S. BEAN,
Judge of Said District Court.

[Endorsed]: Filed Mar. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

That in opposition to the foregoing petition and affidavit and in answer to the foregoing order to show cause, the United States Attorney filed the following answer and affidavit: [41]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(Commr. Case No. 1389.)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

## ANSWER TO PETITION FOR RETURN OF PERSONAL PROPERTY.

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that the Prohibition Agents or either or any of them entered the private dwelling-house of petitioner and therein seized and carried away or therein seized or carried away any of the personal property mentioned and described in petitioner's petition herein, but in this connection alleges the fact to be that the said Prohibition Agents entered a garage and an outbuilding or shed, each of which was disconnected from the dwelling-house of petitioner herein.

Denies that the said petitioner is entitled to have the said intoxicating liquor mentioned and described in petitioner's petition herein returned to him, and in this connection alleges the facts to be as set out in the affidavit of D. W. Rinckel which said affidavit is hereto attached, made part hereof, and marked Exhibit "A," to the same effect as if the same were herein again set out in full. [42]

WHEREFORE respondent prays that said petition be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. U. S. Attorney,
Attorney for Plaintiff. [43]

EXHIBIT "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(Commr. Case No. 1389.)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,
Defendants.

AFFIDAVIT IN OPPOSITION TO PETITION FOR RETURN OF PERSONAL PROPERTY.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

D. W. Rinckel, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a Federal Prohibition Agent, and acting as such under the Federal Prohibition Di-

rector for the State of California, to wit, Samuel F. Rutter.

That there is, and at all of the times herein mentioned was a building located at No. 2933 Webster Street in said City and County of San Francisco; that underneath the said building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress, therefrom, to any other portion of the building; and that the main entrance into the said garage is on and from the said Webster St.

That prior to the 26th day of December, 1922, affiant and other Prohibition Agents had reliable information that intoxicating liquor, to wit, whiskey, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, was stored, sold and delivered from the garage hereinabove mentioned as being underneath the building at No. 2933 Webster [44] Street in said city and county in San Francisco.

That pursuant to said information and on the 26th day of December, 1922, affiant and another Prohibition Agent went to the said premises, and affiant looking through an open door saw in plain sight in said garage about twenty-five cases of intoxicating liquor, to wit, Scotch whiskey, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, which said intoxicating liquor in the said garage was in cases and which said cases were marked: "D. T. Company, Vancouver, B. C.," the said 25 cases each contained 12 bottles. That the said intoxicat-

ing liquor was untax paid and contained no Internal Revenue Stamps whatever. That on the rear of said premises in a shed affiant then and there saw through an open door; five 50-gallon barrels of intoxicating liquor, to wit, whiskey; one fifty-gallon barrel containing approximately five gallons of intoxicating liquor, to wit, whiskey, one 50-gallon barrel half full of intoxicating liquor, to wit, Sherry wine, eighteen fifty-gallon barrels of intoxicating liquor, to wit, red wine, one 10-gallon barrel of intoxicating liquor, to wit, alcohol, one 5-gallon can of intoxicating liquor, to wit, alcohol, two *fifty barrels* of intoxicating liquor, to wit, grape brandy, eleven 5-gallon jugs of intoxicating liquor, to wit, wine, 93 quart bottles of intoxicating liquor, to wit, red wine, and one 2-gallon jug of intoxicating liquor, to wit, white wine, all of which said intoxicating liquor, then and there contained one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes; and fifteen empty 50-gallon barrels, one hydrometer and one glass gauge tube.

That thereafter, and on the said 26th day of December, 1922, affiant secured a search-warrant based upon the above facts, and with said search-warrant entered the said garage and seized the said intoxicating liquor therein, to wit, the said [45] twenty-five cases of intoxicating liquor, and entered the said shed and then and there seized the intoxicating liquor heretofore listed as being contained therein. That all of the said barrels including those that contained liquor as well as the

empty barrels, were marked "Vancouver, B. C." and all of said intoxicating liquor including the said empty barrels and hydrometer and glass gauge, are now in the possession of Samuel F. Rutter as Prohibition Director in and for the State of California.

That affiant did not, nor did any of the other Prohibition Agents present, at any time enter the dwelling of said defendant. That affiant saw intoxicating liquor in the residence of the said defendant, but affiant did not, nor did any of the other Prohibition Agents search for, seize or attempt to seize any of the intoxicating liquor in the said residence of the said defendant.

That at the time of the search and seizure under the said search-warrant affiant then and there arrested one of the defendants herein, to wit, George Blake, for a violation of the said National Prohibition Act, and the said George Blake then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That thereafter on said 26th day of December, 1922, approximately one-half hour after the above said arrest, the defendant, Charles Forni, came to said premises and affiant then and there arrested the said defendant for a violation of the said National Prohibition Act, and the said Charles Forni then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That at all times herein mentioned said liquor was illicit and contraband.

That thereafter, and heretofore an information was filed charging the said George Blake and

Charles Forni with having in their possession the above-mentioned intoxicating liquor, all of which then and there contained one-half of one [46] per cent and more of alcohol by volume and then and there fit for use for beverage purposes.

D. W. RINCKEL.

Subscribed and sworn to before me March 21, 1923.

G. M. TAYLOR.

[Endorsed]: Filed Mar. 21, 1923. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

That upon the hearing of said petition for the return of personal property, the search-warrant in question and the affidavit upon which it was procured, were also produced and considered by the Court, which said search-warrant and affidavit are in words and figures as follows, to wit:

SEARCH-WARRANT.

United States of America,
Northern *Division* of California,
Southern Division,—ss.

To the Federal Prohibition Director for the State of California and His Deputies, or Any or Either of Them, GREETINGS:

WHEREAS, complaint on oath and in writing supported by affidavits has this day been made before me Thomas E. Hayden, a United States Commissioner for said district, by D. W. Rinckel alleging that he has reason to believe, that within

a certain house, store, or building in this district, to wit:

A certain basement garage at #2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear, being the premises of parties unknown there is located certain property, to wit, certain illicit liquors which is being used as a means of committing a misdemeanor, to wit, a violation of the National Prohibition Act of the statutes of the United States.

And whereas the particular grounds or probable cause for the issuance of this warrant and the names of the persons whose affidavit have been taken in support hereof are as follows:

That on the 26th day of December, 1922, your affiant visited the said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of said garage that liquors containing in excess of ½ per cent alcohol, illegally acquired, are stored and traded in from said garage.

And whereas the undersigned is satisfied of the existence of the grounds of said application, or that there is probable cause to believe their existence [47]

YOU ARE THEREFORE HEREBY COMMANDED, in the name of the President of the United States, to enter said premises at any time of the day or night with the necessary and proper

assistance, and forthwith search the same, if found, bring before the undersigned, and to report and act concerning the same as required by you by law.

Witness my hand and seal this 26th day of December, 1922.

(Signed) THOMAS E. HAYDEN,
United States Commissioner Aforesaid.

San Francisco, Calif. Dec. 26th, 1922.

I have this day searched the within described premises and found, to wit:

25 cases of Scotch whiskey.
8– 50 gallon bbls. of whiskey.
1– 50 " bbl. of whiskey containing about 4 in the bottom.
1– 50 " bbl. part full of Sherry wine.
18– 50 " bbls. of red wine.
2–175 " Puncheons of red wine.
1– 10 " bbl. of alcohol.
1– 5 " can of alcohol.
2– 50 " bbls. of grape brandy.
11– 5 " jugs of wine.
93 quart bottles of red wine.
1– 2 gallon jug of white wine.
15 Empty gallon bbls.
1 Hydrometer and glass tube.

D. W. RINCKEL,
Federal Agent.

United States of America,
Northern District of California,
Southern Division,—ss.

On this 26th day of December, 1922, before me, Thomas E. Hayden, a United States Commissioner

for the Northern District of California, Southern Division, personally appeared D. W. Rinckel, who, being by me first duly sworn, did depose and say:

That he has reason to believe, and does believe, that within a certain house, store, building or other place, in the Northern District of California, to wit:

A certain basement garage at #2933 Webster Street, San Francisco, California, and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit, illicit liquors which is being used as the means of committing a felony, to wit, a violation of the National Prohibition Act of the statutes of the United States; that the facts tending to establish the grounds of this application, and the probable cause of deponent believing that such facts exist are as follows:

That this affiant on the 26th day of December, 1922, visited said premises and saw quantities of liquors, without [48] evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½ per cent alcohol illegally acquired, are stored and traded in from this garage.

(Signed) D. W. RINCKEL.

Sworn to before me this 26th day of December, 1922.

(Signed) THOMAS E. HAYDEN.
THOMAS E. HAYDEN,
United States Commissioner.

EXCEPTION No. 1.

That after hearing had on said motion and petition for the return of personal property, the Court denied said petition, to which ruling the defendant duly excepted.

That on the 10th day of April, 1924, the defendant filed his petition and made a motion for the exclusion of certain evidence, said petition and motion being in words and figures as follows, to wit:

(Title of Court and Cause.)

PETITION TO EXCLUDE EVIDENCE. [49]

"To the Honorable, the Above-entitled Court:

"The petition of Charles Forni respectfully shows:

"That Samuel F. Rutter is and was at all of the times herein mentioned the duly qualified and acting prohibition director of the State of California, and that at all times herein mentioned D. W. Rinckel, John Doe, and Richard Roe, were and are the duly authorized and acting agents of said Samuel F. Rutter as such prohibition director; that the true names of said John Doe and Richard Roe are unknown to petitioner and that said names are fictitious and that upon ascertaining the same petitioner will move this Court for an order amending this petition accordingly.

"That he is now and was at all times herein mentioned the owner of and entitled to immediate possession of the following described personal property, to wit:

25 cases of Scotch whiskey.
5– 50 gallon bbls. of whiskey.
1– 50 gallon bbl. of whiskey containing about 4 in the bottom.
1– 50 gallon bbl. part full of Sherry wine.
18– 50 gallon bbls. of red wine.
2–175 gallon Puncheons of red wine.
1– 10 gallon bbl. of alcohol.
1– 5 gallon can of alcohol.
2– 50 gallon bbls. of grape brandy.
11– 5 gallon jugs of wine.
93 quart bottles of red wine.
1– 2 gallon jug of white wine.
15 empty gallon bbls.
1 Hydrometer and glass tube.

"That on the 26th day of December, 1922, said Samuel F. Rutter as such prohibition director thru his agents D. W. Rinckel, John Doe and Richard Roe unlawfully entered *and* private dwelling of petitioner situate in and upon the premises known as No. 2933 Webster Street, San Francisco, California, and unlawfully seized and carried away therefrom the said personal property for an alleged violation of the so-called National Prohibition Act, to wit, the unlawful possession by your petitioner of intoxicating liquors. [50]

"That at the time said personal property was seized as aforesaid and at all times on the 26th day of December, 1922, the said premises, together with the outhouse in the rear of the same, were actually occupied by your petitioner as his private dwelling-house; that said search and said seizures were made

in violation of the rights secured to your petitioner by virtue of the Fourth and Fifth Amendments to the Constitution of the United States of America and Section 25 of the National Prohibition Act, all of which is more particularly set forth in Exhibit 'A,' which is attached hereto and made a part hereof.

"That upon the trial of the above-entitled action United States of America intends to and will use, unless prohibited by an order of this Court, said personal property in evidence against your petitioner.

"WHEREFORE, your petitioner prays that an order be made prohibiting the United States of America from introducing said personal property in evidence at the trial of said action.

"CHARLES FORNI,
"Petitioner.

"FRANK T. O'NEILL,
"H. S. YOUNG,
"Attorney for Petitioner."

"[Endorsed]: Filed Apr. 7, 1924. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk."

That in support of said petition and motion for the exclusion of evidence, the defendant introduced in evidence and filed his affidavit, which said affidavit is in words and figures as follows, to wit:

(Title of Court and Cause.)

AFFIDAVIT IN SUPPORT OF PETITION FOR RETURN OF PERSONAL PROPERTY.

State of California,
City and County of San Francisco,—ss.

Charles Forni, being first duly sworn, deposes and says: [51]

That he is one of the defendants in the above-entitled action.

That on the 26th day of December, 1922, by virtue of an affidavit for that purpose made by one D. W. Rinckel, a certain search-warrant was issued, by Hon. Thomas E. Hayden, United States Commissioner for the Northern District of California, by virtue of which the premises therein described were entered and searched and by virtue of which the personal property described in the petition to exclude evidence on file in the above-entitled action, was seized and taken from the premises of affiant, who at said time was and now is the owner thereof.

That on said 26th day of December, 1922, and for a period of about three years thereto affiant and his brother, Louis Forni, actually resided upon said premises and that on said date and for a period of about three years prior thereto affiant and his brother actually occupied the entire premises described in said search-warrant as their private dwelling-house and for no other purpose or purposes; and that said premises were never used in whole or in part for any business purpose and that

no sale of intoxicating liquors was ever made therein.

That said premises consist of a certain two-story frame building and the basement thereof and an outhouse or shed about 30 feet directly in the rear of said building and which cannot be seen from said Webster Street.

That said building and said shed are within a common enclosure.

That said basement and said shed from time to time during said period, and in particular on the said 26th day of December, 1922, were used by affiant and his said brother for the purpose of therein storing, in addition to said property seized as aforesaid, their personal effects such as furniture, clothing, pictures and the automobile of affiant. [52]

That said D. W. Rinckel, John Doe and Richard Roe gained access to said shed by scaling a wall surrounding same.

That any and every visit made by said D. W. Rinckel, John Doe and Richard Roe, to said premises and any and every search thereof and any and every seizure of any property therefrom was without the consent of and against the will of affiant and his said brother.

CHARLES FORNI.

Subscribed and sworn to before me this 7th day of April, 1924.

[Seal] JOHN McCALLUM,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 7, 1924. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

That to the foregoing petition, motion and affidavit the United States Attorney filed the following answer and affidavit in support thereof:

(Title of Court and Cause.)

ANSWER TO PETITION FOR RETURN OF PERSONAL PROPERTY.

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and on behalf of said plaintiff and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the petitioner herein, denies and alleges as follows:

Denies that the Prohibition Agents or either or any of them entered the private dwelling-house of petitioner and therein seized and carried away or therein seized or carried away any of the personal property mentioned and described in petitioner's petition herein, but in this connection alleges the fact to be that the said Prohibition Agents entered a garage and an outbuilding or shed, each of which was disconnected from the dwelling-house of petitioner herein. [53]

Denies that the said petitioner is entitled to have the said intoxicating liquor mentioned and described in petitioner's petition herein returned to him, and in this connection alleges the facts to be as set out in the affidavit of D. W. Rinckel which

said affidavit is hereto attached, made part hereof, and marked Exhibit "A," to the same effect as if the same were herein again set out in full.

WHEREFORE respondent prays that said petition be denied.

JOHN T. WILLIAMS,
United States Attorney.

_____,
Asst. U. S. Attorney,
Attorney for Plaintiff.

EXHIBIT "A."

(Title of Court and Cause.)

AFFIDAVIT IN OPPOSITION TO PETITION FOR RETURN OF PERSONAL PROPERTY.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

D. W. Rinckel, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a Federal Prohibition Agent, and acting as such under the Federal Prohibition Director for the State of California, to wit, Samuel F. Rutter.

That there is, and at all of the times herein mentioned was a building located at No. 2933 Webster Street, in the said city and county of San Francisco; that underneath the said building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress therefrom to any other portion of the building;

and that the main entrance into the said garage is on and from the said Webster St.

That prior to the 26th day of December, 1922, affiant and other Prohibition Agents had reliable information that intoxicating liquor, to wit, whiskey, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, [54] was stored, sold and delivered from the garage hereinabove mentioned as being underneath the building at No. 2933 Webster Street in said city and county of San Francisco.

That pursuant to said information and on the 26th day of December, 1922, affiant and another Prohibition Agent went to the said premises, and affiant looking thru an open door saw in plain sight in said garage about twenty-five cases of intoxicating liquor, to wit, Scotch whiskey, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, which said intoxicating liquor in the said garage was in cases and which said cases were marked: "D. T. Company, Vancouver, B. C.," and said 25 cases each contained 12 bottles. That the said intoxicating liquor was untax paid and contained no Internal Revenue Stamps whatever. That on the rear of said premises in a shed affiant then and there saw thru an open door, five 50-gallon barrels of intoxicating liquor, to wit, whiskey; one fifty-gallon barrel containing approximately five gallons of intoxicating liquor, to wit, whiskey, one 50-gallon barrel half full of intoxicating liquor, to wit, Sherry wine, eighteen fifty-gallon barrels of intoxi-

cating liquor, to wit, Red Wine, one 10-gallon barrel of intoxicating liquor, to wit, alcohol, one 5-gallon can of intoxicating liquor, to wit, alcohol, two *fifty barrels* of intoxicating liquor, to wit, grape brandy, eleven 5-gallon jugs of intoxicating liquor, to wit, wine, 93 quart bottles of intoxicating liquor, to wit, red wine, and one 2-gallon jug of intoxicating liquor, to wit, white wine, all of which said intoxicating liquor then and there contained one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes; and fifteen empty 50-gallon barrels, one hydrometer and one glass gauge tube.

That thereafter, and on the said 26th day of December, 1922, affiant secured a search-warrant based upon the above facts, and with said search-warrant entered the said garage and [55] seized the said intoxicating liquor therein, to wit, the said twenty-five cases of intoxicating liquor, and entered the said shed and then and there seized the intoxicating liquor heretofore listed as being contained therein. That all of the said barrels, including those that contained liquor as well as the empty barrels, were marked "Vancouver, B. C.," and all of said intoxicating liquor including the said empty barrels and hydrometer and glass gauge are now in the possession of Samuel F. Rutter as Prohibition Director in and for the State of California.

That affiant did not, nor did any of the other prohibition agents present at any time enter the dwelling of the said defendant. That affiant saw intoxicating liquor in the residence of the said de-

fendant, but affiant did not, nor did any of the other Prohibition Agents search for, seize or attempt to seize any of the intoxicating liquor in the said residence of the said defendant.

That at the time of the search and seizure under the said search-warrant affiant then and there arrested one of the defendants herein, to wit, George Blake, for violation of the said National Prohibition Act, and the said George Blake then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That thereafter on said 26th day of December, 1922, approximately one-half hour after the above said arrest, the defendant, Charles Forni, came to said premises and affiant then and there arrested the said defendant for a violation of the said National Prohibition Act, and the said Charles Forni then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That at all times herein mentioned said liquor was illicit and contraband.

That thereafter, and heretofore an information was filed charging the said George Blake and Charles Forni with having in their possession the above mentioned intoxicating liquor, all of which then and there contained one-half of one [56] per cent and more of alcohol by volume and then and there fit for use for beverage purposes.

D. W. RINKEL.

Subscribed and sworn to before me March 20, 1923.

[Endorsed]: Filed ——. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

That upon the hearing of said petition and motion the search-warrant in question and the affidavit upon which it was procured were also produced and considered by the Court. Said search-warrant and affidavit are in words and figures as follows, to wit:

SEARCH-WARRANT.

United States of America,
Northern *Division* of California,
Southern Division,—ss.

To the Federal Prohibition Director for the State of California and His Deputies, or Any or Either of Them, GREETINGS:

WHEREAS, complaint on oath and in writing supported by affidavits has this day been made before me Thomas E. Hayden, a United States Commissioner for said district, by D. W. Rinckel alleging that he has reason to believe that within a certain house, store, or building in this district, to wit: a certain basement garage at #2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit: certain illicit liquors which is being used as a means of committing a misdemeanor, to wit: a violation of the National Prohibition Act of the Statutes of the United States.

And whereas the particular grounds or probable cause for the issuance of this warrant and the names

of the persons whose affidavit have been taken in support hereof are as follows:

That on the 26th day of December, 1922, your affiant visited the said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of said garage that liquors containing in excess of ½ per cent alcohol, illegally acquired, are stored and traded in from said garage.

And whereas the undersigned is satisfied of the existence of the grounds of said application, or that there is probable cause to believe their existence.

YOU ARE THEREFORE HEREBY COMMANDED, in the name of the President of the United States, to enter said premises at any time of the day or night with the necessary and proper assistance, and forthwith search the same, if found, bring before the undersigned, and to report and act concerning the same as required of you by law. [57]

Witness my hand and seal this 26th day of December, 1922.

(Signed) THOMAS E. HAYDEN,
United States Commissioner as Aforesaid.

San Francisco, Calif., Dec. 26th, 1922.

I have this day searched the within described premises and found, to wit:

25 cases of Scotch whiskey.
5– 50 gallon bbls of whiskey.

1– 50 gallon bbl. of whiskey containing about 4 in the bottom.
1– 50 gallon bbl. part full of Sherry wine.
18– 50 gallon bbls. of red wine,
2–175 gallon Puncheons of red wine,
1– 10 gallon bbl. of alcohol,
1– 5 gallon can of alcohol.
2– 50 gallon bbls. of grape brandy,
11– 5 gallon jugs of wine.
93 quart bottles of red wine,
1– 2 jug of white wine.
15 empty gallon bbls.
1 Hydrometer and glass tube.

D. W. RINCKEL,
Federal Agent.

United States of America,
Northern District of California,
Southern Division,—ss.

On this 26th day of December, 1922, before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, Southern Division, personally appeared D. W. Rinckel, who, being by me first duly sworn, did depose and say:

That he has reason to believe, and does believe, that within a certain house, store, building, or other place, in this Northern District of California, to wit:

A certain basement garage at #2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit, illicit liquors, which is being used as the means of committing a felony, to wit: a viola-

tion of the National Prohibition Act of the statutes of the United States; that the facts tending to establish the grounds of this application, and the probable cause of deponent believing that such facts exist are as follows,

That this affiant on the 26th day of December, 1922, visited said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½ per cent alcohol illegally acquired, are stored and traded in from this garage.

(Signed) D. W. RINCKEL.

Sworn to before me this 26th day of December, 1922.

(Signed) THOMAS E. HAYDEN.
THOMAS E. HAYDEN,
United States Commissioner. [58]

EXCEPTION No. 2.

That after hearing had on said motion and petition for the return of personal property and exclusion of evidence the Court denied said petition and motion, to which ruling the defendant duly excepted.

That upon the trial of said cause on the 10th day of April, 1924, the following proceedings were had:

The CLERK.—This case is against Charles Forni and James Blake. Which of the defendants is absent?

The COURT.—Is the defendant Blake here?

The CLERK.—He was around here; Blake has been around and pleaded not guilty.

The COURT.—Is the defendant Blake here?

Mr. O'NEILL.—I am advised by his codefendant that he is a seafaring man and is at sea. He is expected here in a few weeks. I ask, as far as he is concerned, that the matter be continued.

The COURT.—It will not be continued. Forfeit his bail. Go ahead with the trial.

## TESTIMONY OF D. W. RINCKEL, FOR THE GOVERNMENT.

D. W. RINCKEL, called for the United States, being sworn, testified as follows:

Direct Examination by Mr. McDONALD.

I am and for 4 years prior to this date have been a prohibition officer. I have known Charles Forney, also known as "Slim Forney" as long as I have been on the prohibition force. I have arrested him several times.

EXCEPTION No. 3.

Q. About how many times, Mr. Rinckel?

Mr. HUDSON.—That is objected to as incompetent, irrelevant and immaterial. He is only charged here with this particular offense.

Mr. McDONALD.—He is charged with conducting a nuisance. [59]

The COURT.—The rule is well settled, that where the charge is that of maintaining a nuisance, involving the keeping for sale of intoxicating liquor,

(Testimony of D. W. Rinckel.)

previous offenses are admissible. The objection is overruled.

To which ruling of the Court the defendant in open court by his counsel then and there duly excepted.

I arrested him 4 or 5 times. I had occasion to go to No. 2933 Webster Street, San Francisco, on December 26, 1922.

EXCEPTION. No. 4.

Q. Why did you go there, Mr. Rinckel?

A. I got reports there was a large amount of liquor— [60]

Mr. HUDSON.—Objected to on the ground that it is hearsay, and I ask that it be stricken out.

The COURT.—Overruled.

To which ruling of the Court the defendant by his counsel then and there in open court duly excepted.

I went there with Agent Corey, the driver and another agent. The place is a residence house, with a garage underneath, and sheds in the back.

EXCEPTION No. 5.

Q. Did you observe anything when you went there on the 26th day of December, 1922?

A. Yes, sir.

Mr. O'NEILL.—Objected to on the ground that the proper foundation has not been laid. It must be shown first how this witness went there, whether he went there at the request of the defendants and how he got there.

(Testimony of D. W. Rinckel.)

The COURT.—Overruled.

To which ruling of the Court the defendant by his counsel then and there in open court duly excepted.

Mr. McDONALD.—Q. Did you go there on that day?

A. We were watching that place to get a delivery of liquor coming out of there; and a truck came out of there, and the agents searched the truck, and there was nothing on it, and to make sure that this informant was right, we went up there and made an investigation, and found this liquor in the back sheds. We first observed that from another lot, the liquor in the back shed, and climbed into the yard and saw into the basement and saw the liquor piled up there, and went to the United States Commissioner and got a search-warrant, and went back and seized the liquor.

EXCEPTION No. 6.

Q. The liquor seized, Mr. Rinckel, consisted of 25 cases of Scotch whiskey? A. Yes, sir.

Q. Two 50-gallon barrels of whiskey?

A. Yes, sir. [61]

Q. One 50-gallon barrel of whiskey?

A. Yes, sir.

Q. One 50-gallon barrel part full of Sherry wine?

A. Yes, sir.

Mr. HUDSON.—Objected to as incompetent, irrelevant and immaterial, and violative of the rights of the defendant, on the ground that the information was unlawfully obtained and illegally obtained.

(Testimony of D. W. Rinckel.)

The COURT.—Overruled.

To which ruling of the Court the defendant by his counsel then and there in open court duly excepted.

Mr HUDSON.—It was obtained in violation of the rights of the defendant under Section 25 of the so-called Prohibition Act.

The COURT.—Overruled.

To which ruling of the Court the defendant by his counsel then and there in open court duly excepted.

I found there two 175-gallon puncheons of red wine, one 10-gallon barrel of alcohol; a 5-gallon can of alcohol; two 50-gallon barrels of brandy; jugs of red wine, 93 quart bottles of red wine; 2 gallon jugs of white wine; a hydrometer and a glass tube. The defendant Forney was not present at the time but came in later. Blake was present. I talked with Blake first and when Forney came in I talked with him. Blake claimed the liquor until Forney came in and then Forney stated that it was his. I am familiar with various kinds of intoxicating liquor.

EXCEPTION No. 7.

Q. And did you observe the general color, appearance and qualities of this liquor, set forth in the information in this case?

A. It was intoxicating liquor.

Mr. O'NEILL.—We ask that that be stricken out on the ground that it states the conclusion of the

(Testimony of D. W. Rinckel.)

witness. And on the further ground that no proper foundation has been laid for the question. [62]

The COURT.—Motion denied.

To which ruling of the Court the defendant by his counsel then and there in open court duly excepted.

EXCEPTION No. 8.

Mr. McDONALD.—Q. Do you say from your experience as a prohibition officer and your experience with intoxicating liquor that all of this liquor contained over one-half of one per cent of alcohol by volume? A. Yes, sir.

Mr. O'NEILL.—The same objection and motion.

The COURT.—The same ruling.

To which ruling of the Court the defendant by his counsel then and there in open court duly excepted.

I placed Forney under arrest and subsequently filed an information.

Cross-examination by Mr. HUDSON.

This is a dwelling-house with a garage underneath and with outhouses, which were all enclosed with fences. I climbed over the fence and I could see into the basement and see the wine barrels and bottles there, which were in the shed from the adjoining yard and I climbed over the fence and could see into the basement. I saw no liquor being sold there. It was reported to our office that they were taking liquor in and out of there all of the time. The report came from a neighbor next door.

(Testimony of D. W. Rinckel.)

Q. (By the COURT.) You have made arrests of this man for violation of the prohibition law before?

A. Yes, sir, for bootlegging. He has what is known as "Slim's Fly Trap Restaurant" there.

As to where the liquor came from, I have only Forney's statement. He said he purchased Scotch whiskey from a boat which was lying outside. He bought the liquor "over the rail" outside; I mean by "over the rail" outside from a boat which was lying outside, that is the Scotch whiskey had been purchased over the rail [63] from outside.

The Government rests.

Whereupon the defendant to maintain the issue raised by his plea of "not guilty" introduced the following evidence:

## TESTIMONY OF ENRICO BESOZZI, FOR DEFENDANT.

ENRICO BESOZZI, being sworn, testified on behalf of defendant, as follows:

Direct Examination by Mr. O'NEILL.

I have known Charles Forney for 17 or 18 years. I visited at the premises on Webster Street many times when his sister was keeping house for him. Q. Do you know who lived with him on the 26th of December, 1922? A. I could not say that, as to the time; I know his sister and know the house; it was prepared for him, his sister and brother, and when his sister was there I visited the house a lot

(Testimony of Enrico Besozzi.)

of the time, but at the end of this year I know nothing much about it. The sister got married, and then "Slim" lived there right along, and when you want the boy you can always get him there right along. I know he lived there right along. I know that the sister, his brother, and "Slim" lived there at the house at the time—the house was fixed for them. It had three rooms downstairs, two rooms upstairs and a garage. I have had meals there myself. There is a stove there, dishes and groceries and everything necessary to maintain a family. Forney was in the habit of sleeping there every night. It was his customary sleeping place. An automobile was kept in the basement and wood and coal in the shed.

Q. Do you know what was stored in the basement, in addition to this liquor taken from there; was there anything else ever there? A. I don't know anything about that. I know I go there and went upstairs. I didn't figure what was in the basement at all. Q. Did you have occasion to visit the outhouse on the premises? A. I was there once. Q. Did you see anything there at all besides liquor? A. No, sir. [64]

Q. Did you ever see any groceries there? A. Back there?

A. I saw some wood; and they had coal and wood for the house; something like that.

Q. Wood and coal. And did the basement look like—from what opportunity you had of observing

(Testimony of Enrico Besozzi.)

it—did it look like as if an automobile had been stored there?

A. There was an automobile there; yes, sir.

Cross-examination by Mr. McDONALD.

I am a restaurant-keeper—The Fly Trap Restaurant, 73 Sutter Street. I never saw any liquor stored there. I saw groceries there but I never asked if there was liquor there.

## TESTIMONY OF S. FORNI, FOR DEFENDANT.

S. FORNI, being sworn, testified as follows on behalf of defendant:

Direct Examination by Mr. O'NEILL.

The defendant is my brother. I wasn't at the Webster Street premises at the time the liquor was taken. I absolutely know these premises was his home.

EXCEPTION No. 9. [65]

The COURT.—This is all covered by the affidavit. What has this to do with the case before the jury?

Mr. O'NEILL.—It is our contention that this was taken from the private home of the defendant.

The COURT.—The point has been ruled on and against you. I will allow no testimony on that matter. The jury has nothing to do with the question of the search-warrant. They are to determine the facts. That is a question of law.

Mr. O'NEILL.—We take exception to the ruling of the Court.

Whereupon the defendant rested.

Argument having been waived by respective counsel the Court proceeded to instruct the jury as follows:

## INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—(Orally.) You will bear in mind, that this defendant is presumed to be innocent of the charges made against him until he is proven guilty to a moral certainty and beyond a reasonable doubt. A reasonable doubt, as heretofore explained to you, is that kind of a doubt which would influence you in the important affairs of your own lives. In this case you will note that the defendant has not taken the stand in his own behalf. That is his constitutional right and privilege, and you are not in any way to consider his failure to be a witness in his own behalf, that is, to take the witness-stand in his own behalf, against him in any manner or form whatsoever. In other words, you will dismiss that from your minds entirely.

In this particular case, the information contains two counts or charges. The first count or charge is that he had in his possession certain alcoholic liquors, which have been described to you here, for the purpose of sale. In order to find him guilty on the first count, you must not only find he had the liquor there, but that he had it there for the purposes of sale; and in determining that you are entitled to take [66] into consideration the fact, if you find it to be a fact, the testimony of the witness Rinckel, that he has been arrested as a bootlegger before. Furthermore, you are instructed

that, under the prohibition law, the possession of liquor, intoxicating liquor, establishes a presumption that it was kept for sale, and the burden of the case is on the defendant to show that it was not kept there for sale.

As to the second count: If you should find he was in possession of the liquor, you must find him guilty upon that count.

You must find him either guilty or not guilty on each count of the two counts; and it requires an unanimous verdict at your hands. That applies to both of the defendants.

Are there any objections to the instructions?

EXCEPTION No. 10.

Whereupon the defendant excepted to the failure of the Court to give the following charge to the jury as theretofore requested:

If the premises in question were used and occupied by defendant as a private dwelling, to justify a verdict of guilty, you must find from the evidence, either that it was being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose.

EXCEPTION No. 11.

Whereupon defendant excepted to the failure of the Court to give the following charge to the jury, as theretofore requested:

The term private dwelling includes the entire frame building in which the dweller resides as well as all buildings and outhouses situated within the common enclosure provided that the same are used

solely for the comfort and convenience of the dweller and are not used for any business. [67]

Whereupon the jury retired and thereafter returned a verdict of guilty as to the defendant Charles Forney.

That thereafter said Court rendered its sentence and judgment upon said defendant; that said proposed bill of exceptions was lodged on the 5th day of August, 1924, within legal time, and that the time of the plaintiff within which to prepare amendments thereto was by orders of Court, based upon stipulations of the parties, extended to and including the 1st day of October, 1924, and the time to settle the same was likewise extended to and including the 8th day of October, 1924.

That said defendant hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same be allowed, signed and sealed and made a part of the record in this case.

Dated this 8th day of October, 1924.

PRESTON & DUNCAN,
H. S. YOUNG,
R. G. HUDSON,
FRANK T. O'NEILL,
Attorneys for Defendant. [68]

IT IS HEREBY STIPULATED AND AGREED that the foregoing comprises all the proceedings and testimony had and taken upon the trial of said cause and that the same may be settled

and allowed by any judge of the above-entitled court.

PRESTON & DUNCAN,
H. S. YOUNG,
R. G. HUDSON,
FRANK T. O'NEILL,
Attorneys for Defendant.
STERLING CARR,
United States Attorney.
T. J. SHERIDAN,
Asst. U. S. Attorney.

The foregoing bill of exceptions is hereby settled and allowed.

Dated this 8th day of October, 1924.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Oct. 8, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [69]

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In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 13,126.

THE UNITED STATES OF AMERICA

vs.

CHARLES FORNI and GEORGE BLAKE.

(VERDICT.)

We, the jury, find as to the defendants at the bar, as follows:

Charles Forni, Guilty on 1st Count and *and* Guilty on 2d Count.

George Blake, Guilty on 1st Count and Guilty on 2d Count.

JOHN A. KEATING,
Foreman.

[Endorsed]: Filed April 10, 1924, at 3 o'clock and 35 minutes P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [70]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

Convicted Viol. National Prohibition Act.

THE UNITED STATES OF AMERICA

vs.

CHARLES FORNI.

JUDGMENT ON VERDICT OF GUILTY.

J. F. McDonald, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the information filed on the 20th day of March, 1924, charging him with the crime of violating the National Prohibition Act; of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 10th day of April, 1924, to wit: "We, the Jury, find as to

the defendants at the bar as follows: Charles Forni, Guilty on 1st Count and Guilty on 2d Count. George Blake Guilty on 1st Count and Guilty on 2d Count. John A. Keating, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for a new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Charles Forni having been duly convicted in this court of the crime of Violating National Prohibition Act;

IT IS FURTHER ORDERED AND ADJUDGED that the said Charles Forni be imprisoned for the period of One (1) Year and pay a fine in the sum of Five Hundred ($500.00) Dollars as to the 1st Count; that he pay a fine in the sum of Five Hundred [71] ($500.00) Dollars as to the second count. Further ordered that in default of the payment of said fines that said defendant be imprisoned until said fines be paid or until he be otherwise discharged in due course of law. Further ordered that said defendant be imprisoned in the County Jail, County of San Francisco, California.

Judgment entered this 10th day of April, 1924.

WALTER B. MALING
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 16, Judg. and Decrees, at page 175. [72]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,

Defendants.

## PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

Now comes Charles Forni, one of the defendants herein, and says that on the 10th day of April, 1924, this Court rendered judgment herein against him in which judgment and proceedings had prior thereto in this cause, certain errors were permitted to the prejudice of the said defendant, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE the said defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to said Circuit Court of Appeals and that said defendant

be awarded a supersedeas upon said judgment and all necessary and proper process, including bail.

CHARLES FORNI,
Defendant.
PRESTON and DUNCAN,
H. S. YOUNG,
R. G. HUDSON,
Attorneys for Defendant. [73]

Due service and receipt of a copy of the within admitted this 30 day of September, 1924.

STERLING CARR,
Attorney for Plff.

[Endorsed]: Filed Oct. 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [74]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,
Defendants.

## ASSIGNMENT OF ERRORS.

Charles Forni, one of the defendants in the above-entitled cause, and plaintiff in error herein, having petitioned for an order granting him a

writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against said Charles Forni, now makes and files with his said petition the following assignment of errors herein, upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States for the Northern District of California, there is manifest error in this, to wit:

I.

The Court erred in denying the petition of defendant and plaintiff in error filed on March 13, 1923, for the return of certain personal property seized at the home of said defendant in violation of defendant's rights under the Fourth and Fifth Amendment to the Constitution of the United States. [75]

II.

The Court erred in denying the petition of defendant and plaintiff in error filed on April 7, 1923, for the exclusion from evidence of certain personal property seized at the home of said defendant in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

III.

The Court erred in admitting over the objections of defendant and plaintiff in error, testimony as to the amount, and character of certain intoxicating liquors which had been seized and taken from defendant in violation of his constitutional rights as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, to which ruling defendant and plaintiff in error duly excepted.

IV.

The Court erred in overruling the objection of the question "About how many times, Mr. Rinckel?" in this, that it was immaterial how many times defendant has been arrested.

V.

The Court erred in overruling the objection to the question "Why did you go there, Mr. Rinckel?" in this, that the reasons which prompted the visit to the home of defendant by the agents were immaterial.

VI.

The Court erred in overruling the objection to the question, "Did you observe anything when you went there on the 26th day of December, 1922?" in this, that it should first have been shown whether the officer visited the home of defendant at his request or for the purpose of making an illegal search and seizure, in which latter case his testimony should have been excluded for the reason that the subject matter thereof had been obtained in violation of the rights of the defendants as guar-

anteed by the Fourth and Fifth Amendments to the Constitution of the United States. [76]

VII.

The Court erred in permitting the witness Rinckel to testify over the objection of defendant, as to his conclusions concerning the liquor seized, in this, said Rinckel did not qualify as a witness on this subject.

VIII.

The Court erred in refusing to permit the defendant to produce testimony concerning the character of the premises on Webster Street, in this, that defendant offered to prove that these premises constituted his dwelling place and as such were immune from search in this case.

IX.

The Court erred in refusing to instruct the jury as follows, to wit:

> If the premises in question were used and occupied by defendant as a private dwelling, to justify a verdict of guilty, you must find from the evidence, either that it was being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose.

X.

The Court erred in refusing to instruct the jury as follows, to wit:

> The term private dwelling includes the entire frame building in which the dweller resides as well as all buildings and outhouses situated

within the common enclosure provided that the same are used solely for the comfort and convenience of the dweller and are not used for any business.

WHEREFORE, defendant prays that said judgment be reversed and that this action be remanded to the District Court of the United States in and for the Southern Division of the Northern District of California, with the direction to retry said action on all the issues raised by the pleadings herein.

PRESTON and DUNCAN,
H. S. YOUNG,
R. G. HUDSON,

Attorneys for Charles Forni, Defendant and Plaintiff in Error. [77]

[Endorsed]: Service and receipt of a copy of the within admitted this —— day of ——, 192—.

STERLING CARR,
Attorney for ———.

Filed Oct. 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [78]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 7th day of October, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable FRANK H. KERRIGAN, District Judge.

No. 13,126.

UNITED STATES OF AMERICA

vs.

CHARLES FORNI et al.

MINUTES OF COURT—OCTOBER 7, 1924—ORDER ALLOWING WRIT OF ERROR, ETC.

After hearing C. A. Linn, Esq., attroney for defendant and T. J. Sheridan, Asst. U. S. Atty., ordered that the petition for writ of error this day filed be and the same is hereby allowed and that citation issue. Further ordered that the application for the release of defendant on bond and supersedeas be and the same is hereby denied. [79]

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In the Southern Division of the United States of America, for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEORGE BLAKE,

Defendants.

ORDER EXTENDING TIME TO AND INCLUDING MAY 1, 1924, TO FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be and they are, hereby allowed to and including the 1st day of May, 1924, in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated: April 19th, 1924.

FRANK H. KERRIGAN.

[Endorsed]: Filed Apr. 19, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated May 1, 1924.

FRANK H. KERRIGAN,
U. S. District Judge.

[Endorsed]: Filed May 1, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [81]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI et al.,
Defendants.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated: May 12, 1924.

KERRIGAN,
U. S. District Judge.

[Endorsed]: Filed May 12, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [82]

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In the Southern Division of the United States District Court, for the Northern District of the State of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI et al.,
Defendants.

STIPULATION AND ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the defendants, and each of them, may have ten (10) days' further time from the date hereof within which to prepare, serve and file their, and each of their, proposed bill of exceptions.

Dated: May 22d, 1924.

JOHN T. WILLIAMS,
United States Attorney.
By KENNETH M. GREEN,
Sp. Asst. U. S. Atty.
H. S. YOUNG,
Attorney for Defendants.

So ordered.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed May 22, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [83]

In the District Court of the United States for the Northern District of California.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

STIPULATION AND ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the defendants, and each of them, be, and they are hereby, allowed ten (10) days' further time from date hereof in which to prepare, serve, file and lodge their and issue their proposed bill of exceptions.

Dated: June 2d, 1924.

UNITED STATES ATTORNEY.
By J. F. McDONALD,
H. S. YOUNG,
Attorneys for Defendants.

So ordered.

PARTRIDGE,
Judge.

[Endorsed]: Filed June 2, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [84]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI,

Defendant.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated: June 12, 1924.

FRANK H. KERRIGAN,
U. S. District Judge.

Approved.

JOHN T. WILLIAMS,
U. S. Attorney.
By JOHN T. WILLIAMS.

[Endorsed]: Filed June 12, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [85]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated June 21st, 1924.

JOHN S. PARTRIDGE,
U. S. District Judge.

[Endorsed]: Filed Jun. 21, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [86]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated: July 1st, 1924.

PARTRIDGE,
U. S. District Judge.

[Endorsed]: Filed July 1, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [87]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated: July 11th, 1924.

JOHN S. PARTRIDGE,
U. S. District Judge.

OK.—T. J. SHERIDAN,
Asst. U. S. Atty.

[Endorsed]: Filed Jul. 11, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [88]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

ORDER EXTENDING TIME TEN DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the defendants, and each of them, be, and they are, hereby allowed ten days' further time from the date hereof in which to prepare, serve and file and lodge their, and each of their, proposed bill of exceptions.

Dated: July 21st, 1924.

WM. W. MORROW,
U. S. Circuit Judge.

O. K.—J. F. McDONALD,
Asst. U. S. Atty.

[Endorsed]: Filed July 21, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [89]

In the Southern Division of the United States District Court for the Northern District of the State of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI et al.,

Defendants.

STIPULATION AND ORDER EXTENDING TIME FIVE DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the defendants, and each of them, may have five (5) days' further time from the date hereof within which to prepare, serve and file their, and each of their, proposed bill of exceptions.

Dated: July 31st, 1924.

STERLING CARR,
United States Attorney.
J. F. McD.

So ordered.

PARTRIDGE,
Judge.

[Endorsed]: Filed Jul. 31, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [90]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEO. *C*LAKE,

Defendants.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING AUGUST 15, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendants may have to and including the 15th day of August, 1924, within which to lodge and settle their bill of exceptions.

STERLING CARR,
U. S. Attorney.
By GROVE J. FINK,
Sp. Asst. U. S. Atty.
H. S. YOUNG,
Attorney for Defendants.

Approved.

KERRIGAN,
Judge.

[Endorsed]: Filed Aug. 5, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [91]

In the District Court of the United States, for the Northern District of California.

No. 13,126.

UNITED STATES,

Plaintiff,

vs.

CHARLES FORNI,

Defendant.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING AUGUST 25, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the defendant may have to and including the 25th day of August, 1924, within which to settle his bill of exceptions on file herein.

Dated: August 15, 1924.

STERLING CARR,
United States Attorney.
By GARTON D. KEYSTON,
Asst. U. S. Atty.
H. S. YOUNG,
Attorneys for Defendant.

So ordered.

KERRIGAN,
Judge.

[Endorsed]: Filed Aug. 16, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [92]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,

Defendants.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 3, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendants may have to and including the 3d day of September, 1924, within which to lodge and settle their bill of exceptions.

Dated: August 25th, 1924.

STERLING CARR,
U. S. Attorney.

By GARTON D. KEYSTON,
Asst. U. S. Atty.

H. S. YOUNG,
Attorney for Defendants.

Approved.

PARTRIDGE,
Judge.

[Endorsed]: Filed Aug. 25, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [93]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,
Defendants.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 1, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendants may have to and including the 1st day of October, 1924, within which to lodge and settle their bill of exceptions.

STERLING CARR,
U. S. Attorney.
By GARTON D. KEYSTON,
H. S. YOUNG,
Attorney for Defendant.

Approved.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed Sep. 3, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [94]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,

Defendants.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 5, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendants may have to and including the 5th day of October, 1924, within which to lodge and settle their bill of exceptions.

STERLING CARR,
U. S. Attorney.
By T. J. SHERIDAN.
H. S. YOUNG,
Attorney for Defendants.

Approved.

KERRIGAN,
Judge.

[Endorsed]: Filed Oct. 1, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [95]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,126.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES FORNI and GEO. BLAKE,
Defendants.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 8, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendants may have to and including the 8th day of October, 1924, within which to lodge and settle their bill of exceptions.

STERLING CARR,
U. S. Attorney.
By T. J. SHERIDAN.
H. S. YOUNG,
Attorney for Defendants.

Approved.

MORROW,
Judge.

[Endorsed]: Filed Oct. 6, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [96]

## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 96 pages, numbered from 1 to 96, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the case of United States of America vs. Charles Forni, No. 13,126, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorneys for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of thirty-five dollars and twenty cents ($35.20), and that the same has been paid to me by the attorneys for the plaintiff in error herein.

Annexed hereto are the original writ of error (page 98), return to writ of error (page 99) and original citation on writ of error (page 100).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of October, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [97]

## WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Charles Forni, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Charles Forni, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 7th day of October, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District of California.

Allowed by:

FRANK H. KERRIGAN.

[Endorsed]: No. 13,126. United States District Court for the Northern District of California. Charles Forni, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Oct. 7, 1924. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [98]

## RETURN TO WRIT OF ERROR.

The Answer of the Judges of the United States District Court, for the Northern District of California, to the within writ or error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 7th day of October, A. D. 1924, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

By C. M. Taylor,

Deputy Clerk. [99]

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## CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issuerd and now on file in the Clerk's office of the United States District Court for the Northern District of California, wherein Charles Forni is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 7th day of October, A. D. 1924,

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: No. 13,126. United States District Court for the Northern District of California. Charles Forni, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 7, 1924. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [100]

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[Endorsed]: No. 4355. United States Circuit Court of Appeals for the Ninth Circuit. Charles Forni, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed October 10, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4355

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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CHARLES FORNI,

*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

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H. S. YOUNG,
R. G. HUDSON,
FRANK T. O'NEILL,
PRESTON & DUNCAN,
*Attorneys for Plaintiff in Error.*

B. F. RABINOWITZ,
*Of Counsel.*





PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Cases Cited

No. 4355

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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CHARLES FORNI,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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### I.

### STATEMENT OF THE CASE.

The plaintiff in error was charged by information with violations of the National Prohibition Act. He was charged jointly with another defendant named George Blake, who, however, did not appear at the trial. The information contained two counts. The first count charged plaintiff in error and Blake with maintaining "a common nuisance in that the said defendants did then and there wrongfully and unlawfully keep for sale on the premises aforesaid, certain intoxicating liquor, to wit"; Then follows a description of certain quantities of liquor. The other count charged that the defendants "did then and there wrongfully and unlawfully possess cer-

tain intoxicating liquor, to wit": Then follows description of the same liquor. Both counts charge the crimes to have been committed on the 26th day of December, 1922, and both crimes are charged to have been committed at the same premises, namely No. 2933 Webster Street in the City and County of San Francisco.

The information was filed on the 21st day of March, 1923. The trial was had on April 10, 1924, and the jury convicted the plaintiff in error on both counts. The judge of the District Court on the 10th day of April, 1924, imposed a sentence upon the plaintiff in error that he "be imprisoned for the period of one year and pay a fine in the sum of $500.00 as to the first count; that he pay a fine in the sum of $500.00 as to the second count". And the sentence further provided that in default of the payment of said fines, that defendant be imprisoned untid said fines are paid or he be otherwise discharged in due course of law, and that his imprisonment should be in the county jail of the County of San Francisco. (See Tr. pp. 77-78.)

Prior to the filing of said information and on the 26th day of December, 1922, D. W. Rinckel, who was an agent of Samuel F. Rutter, Prohibition Director of the State of California, filed an affidavit before Thomas E. Hayden, U. S. Commissioner, in support of an application for a search warrant (Tr. pp. 49 and 50), and on the same day, said Commissioner issued a search warrant. (Tr. pp. 47 and 48.) The search warrant practically

copied the charging part of this affidavit, and authorizes the Federal Prohibition Director, or any of his deputies "to enter said premises at any time of the day or night, with the necessary and proper assistance, and forthwith search the same, if found, bringing before the undersigned, and to report and act concerning the same as required by you under law".

With this search warrant, the said Rinckel entered the premises and searched the same, and seized the liquor described in the information, and made his unverified return thereof to the Commissioner on the said 26th day of December, 1922. (See Tr. p. 49.) On March 13, 1923, Charles Forni, the plaintiff in error, filed in the District Court of the United States, his duly verified petition for a return to him of the personal property, consisting of liquors, which had been thus seized. (See Tr. pp. 9-15.) Upon filing this petition, an order to show cause was issued by the judge of that court, requiring the prohibition officer Rinckel to show cause before the court why the personal property should not be returned to the petitioner. An answer to this petition was filed by the United States District Attorney on the 21st day of March, 1923 (Tr. pp. 17-23), and at the same time, and as a part of said petition, there was filed with it the affidavit of the prohibition officer Rinckel, which appears at pages 19-22 of the transcript.

The plaintiff in error, in support of his petition for the return of the personal property, filed his

affidavit, which appears at pages 14 and 15 of the transcript. In the affidavit of the plaintiff in error it is stated that the premises from which the said personal property of which affiant was the owner was seized under the warrant, and taken, was the private dwelling house of the plaintiff in error and his brother, and that the same was used as a private dwelling house and for no other purpose, and that the said building and the said shed were within a common enclosure. That the officer Rinckel gained access to the premises by scaling a wall surrounding the same. The affidavit of the prohibition officer Rinckel stated that there was a building located at No. 2933 Webster Street, and that underneath the building is a garage which is disconnected from any other portion of the building "in that there is no ingress or egress therefrom to any other portion of the building, and that the main entrance into the said garage is on and from the said Webster Street".

It then proceeds to state that the affiant had reliable information that intoxicating liquor, to wit, whiskey, was stored, sold and delivered from the garage, and that on the 26th of December, 1922, they saw certain other liquors there in the shed on the same premises. That they secured a search warrant on that day and seized the liquors in question here. There is no statement in the affidavit of the prohibition agent that this place was not the residence of the plaintiff in error. The only inference along that line that can be made is from

his statement that there is no method of entering the garage from the building above except through the entrance on the street.

Upon this application for a return of the property, the court made an order denying the application. Thereafter and on the 7th day of April, 1924, which was prior to the trial of this action, the plaintiff in error here, filed his petition in the District Court to exclude from evidence the personal property so seized. He filed with this petition the affidavit of the plaintiff in error, stating that these premises constituted his private dwelling and that he was at the time of said search and seizure the owner thereof and that at the time of said search and seizure and for about three years prior thereto, the same was the private dwelling house of himself and his brother, and that they actually occupied the entire premises, including the garage. That the premises were never used for any business purpose, and that no sale of intoxicating liquor was ever made therein.

> "That the said premises consist of a certain two-story frame building and the basement thereof, and an outhouse or shed about thirty feet directly in the rear of said building, and which cannot be seen from said Webster Street. That said building and said shed are within a common enclosure."

It is further stated in the affidavit that Rinckel and his associate gained access by scaling a wall surrounding the premises, and also states that the

seizure was made, of course, against the consent and will of the plaintiff in error.

The defendant was called for trial on April 10, 1924. The Government, through the United States District Attorney, in answer to the petition to exclude the seized property as evidence, presented, in opposition thereto, its answer to the petition for the return of the personal property, filed a long time prior thereto, together with the affidavit of Rinckel made March 20, 1923, and used in opposition to the petition to return the property, and also the search warrant and affidavit on which it was based were introduced in evidence in opposition to the petition to exclude from evidence. On these documents, the judge of the District Court made an order denying the motion and petition of the plaintiff in error for the return of the property and the exclusion of the evidence. The plaintiff in error duly saved exceptions to these rulings of the court. (Ex. Nos. 1 & 2.)

Thereupon the trial of the plaintiff in error was immediately proceeded with. The only witnesses offered by the Government at the trial was the prohibition agent Rinckel who had made the search and seizure. He was asked by the Government as to the seizing of this property and to tell and relate what property it was he seized and took away. An objection to this was made by counsel for plaintiff in error on the ground that the evidence and information were illegal and unlawfully obtained. (Tr. p. 67.) The objection was overruled and the

witness was allowed to testify as to all the property which he had seized.

On the examination of the witness Rinckel, he testified that the place searched was

> "a dwelling house with a garage underneath and with outhouses which were all enclosed with fences. I climbed over the fence and I could see into the basement and see the wine barrels and bottles there, which were in the shed, from the adjoining yard, and I climbed over the fence and could see into the basement. I saw no liquor being sold there. It was reported to our office that they were taking liquor in and out of there all the time. The report came from a neighbor next door." (Tr. p. 69.)

The defendant thereupon produced as a witness one Enrico Besozzi, who testified that he was acquainted with the premises and knew them to be the residence of the plaintiff in error. The defendant also produced his brother, S. Forni, as a witness, who was being interrogated about the premises and as to whether the same was the private residence of the plaintiff in error, when the court stopped the counsel for plaintiff in error, saying:

> "This is all covered by the affidavit. What has this to do with the case before the jury?
>
> Mr. O'Neill. It is our contention that this was taken from the private home of the defendant.
>
> The Court. The point has been ruled on and against you. *I will allow no testimony on that matter.* The jury has nothing to do with the question of the search warrant. They are to determine the facts. That is a question of law."

To this ruling counsel for the plaintiff in error duly excepted. (No. 9, Tr. p. 72.)

Various other rulings were made by the court which need not be detailed here which were excepted to by counsel for plaintiff in error, but will be referred to later on.

Argument was waived by the respective counsel, and the court proceeded to instruct the jury. (Tr. p. 73.) The court first instructed the jury that the defendant is presumed to be innocent until he is proven guilty to a moral certainty and beyond a reasonable doubt, and called attention to the fact that the defendant had not taken the stand in his own behalf and that they were not to take this against him in any manner, and then the court instructed the jury as follows:

> "In this particular case, the information contains two counts or charges. The first count or charge is that he had in his possession certain alcoholic liquors which have been described to you here, for the purpose of sale. In order to find him guilty on the first count, you must not only find he had the liquor there, but that he had it there for the purpose of sale; and in determining that, you are entitled to take into consideration the fact, if you find it to be a fact, the testimony of the witness Rinckel, that he has been arrested as a bootlegger before. Furthermore, you are instructed that, under the Prohibition law, the possession of liquor, intoxicating liquor, establishes a presumption that it is kept for sale, and the burden of the case is on the defendant to show that it was not kept there for sale.

> As to the second count: If you should find he was in possession of the liquor, you must find him guilty on that count."

The defendant requested the court to give the following instructions:

> "If the premises in question were used and occupied by defendant as a private dwelling, to justify a verdict of guilty, you must find from the evidence, either that it was being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose."

This instruction was refused by the court, and the refusal was excepted to by counsel for plaintiff in error.

The counsel for plaintiff in error requested the court to give an instruction defining the term "private dwelling" as follows:

> "The term 'private dwelling' includes the entire frame building in which the dweller resides, as well as all buildings and outhouses situated within the common enclosure, provided that the same are used solely for the comfort and convenience of the dweller and are not used for any business purposes."

This instruction was refused by the court and an exception saved to the ruling by counsel for plaintiff in error. (Tr. p. 74.) The case was submitted to the jury, which found the plaintiff in error here guilty as before stated.

## II.

**THE JUDGMENT OF CONVICTION HEREIN MUST BE REVERSED BECAUSE OF TWO FUNDAMENTAL ERRORS, SERIOUSLY PREJUDICING THE RIGHTS GUARANTEED BY THE CONSTITUTION.**

Our position in brief is as follows:

### A.

The only evidence adduced at the trial was evidence procured by the government in violation of the rights guaranteed to the plaintiff in error by the Fourth and Fifth Amendments to the Federal Constitution through the illegal issuance of a search warrant and the consequent invasion of his home and the seizure therein, under such void search warrant, of personal property lawfully in his possession.

### B.

That in addition to the above underlying objection to all evidence adduced at the trial the court permitted inquiries as to previous *arrests* of the plaintiff in error in violation of well settled rules of evidence and such evidence resulted in a serious miscarriage of justice.

Preliminary to a consideration of the objection first above noted we take it to be the conceded law obtaining in all Federal courts that in the face of an objection seasonably made, evidence illegally seized or obtained will not be admitted against a defendant in a criminal case.

Such is the rule established by

*Boyd v. United States,* 116 U. S. 616; 29 L. Ed. 746;

*Weeks v. United States,* 232 U. S. 383; 58 L. Ed. 652;

*Gouled v. United States,* 255 U. S. 398; 65 L. Ed. 647;

*Amos v. United States,* 255 U. S. 313; 65 L. Ed. 654.

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## III.

### THE SEARCH WARRANT WAS ILLEGALLY ISSUED AND NO EVIDENCE SECURED THROUGH THE ILLEGAL SEARCH COULD BE USED AGAINST THE DEFENDANT.

An examination of the transcript will disclose that the only evidence as to intoxicating liquor in the possession of the plaintiff in error was given by Mr. Rinckel, an agent of the Prohibition Director, and consisted of an itemization of the liquor seized by him under a search warrant. (Tr. pp. 67-69.) If, therefore, the search warrant was illegally issued or improperly executed, in view of the motions properly made to return the property seized and to exclude all evidence secured in connection with said seizures, then this testimony was not properly before the jury and there being no other testimony whatsoever in addition thereto the verdict of the jury cannot stand.

The statutes governing the issuance of search warrants pertinent to this discussion are:

"A search warrant may issue as provided in Title XI of Public Law, No. 24 of the 65th Congress approved June 15, 1917 * * *."

(Sec. 25 of Title II of the National Prohibition Act (41 C. 315).)

The act referred to provides, Sec. 3:

"A search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing the property in the place to be searched."

Sec. 4 provides:

"The judge or commissioner must before issuing the warrant examine on oath the complainant and any witness he may produce and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making oath."

Sec. 5 reads:

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or principal cause for believing that they exist."

Sec. 25 of Title II of the National Prohibition Act further provides:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

The affidavit on which the search warrant was issued in the instant case is as follows:

"On this 26th day of December, 1922, before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, Southern Division, personally appeared D. W. Rinckel, who, being by me first duly sworn did depose and say:

That he has reason to believe, and does believe, that within a certain house, store, building, or other place, in this Northern District of California, to wit:

A certain basement garage at No. 2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit, illicit liquors, which is being used as the means of committing a felony, to wit: a violation of the National Prohibition Act of the statutes of the United States; that the facts tending to establish the grounds of this application, and the probable cause of deponent believing that such facts exist are as follows:

That this affiant on the 26th day of December, 1922, visited said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½ per cent alcohol illegally acquired, are stored and traded in from this garage.

(Signed) D. W. Rinckel.

Sworn to before me this 26th day of December, 1922."

We submit that under the statutes above set forth said affidavit was fatally defective and no search warrant could properly issue on the basis thereof for the following reasons:

(a) The affidavit is based on hearsay, information and belief and conclusions and contains no averment of a single fact, on the basis of which any reasonable cause for believing an offense against the Prohibition Act was being committed could be predicated.

(b) The premises to be searched, as appears from the affidavit itself, consisted of a private residence and there is no allegation of any facts warranting a belief that a sale of liquor had been made therein.

Sec. 25 of Title II of the National Prohibition Act quoted above provides that no search warrant shall issue for the search of a private dwelling occupied as such in the absence of sufficient evidence that the same is being used for the sale of liquor therein.

The affidavit in support of the search warrant designates the premises to be searched as

> "a certain basement garage at No. 2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear."

The petition of the plaintiff in error to exclude evidence avers that the petitioner resided on the premises known as No. 2933 Webster Street; that the garage consisted of the basement of said dwell-

ing house and that the shed was within a common enclosure containing both said shed and said building.

The petition for return of personal property on behalf of plaintiff in error repeats the same allegation and in this connection the affidavit of the prohibition agent Rinckel in opposition to said petitions declares:

> "That there is, and at all of the times herein mentioned was a building located at No. 2933 Webster Street in said City and County of San Francisco; that underneath the said building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress, therefrom, to any other portion of the building; and that the main entrance into the said garage is on and from the said Webster Street."

The issue clearly then is whether a garage underneath a building occupied exclusively as a private dwelling but which is disconnected from any other portion of the building in that the only entrance to said garage is from the street, deprives said garage of the protection afforded by Sec. 25 of Title II of the Prohibition Act, quoted above, and whether a shed within a common enclosure with a private dwelling house and adjacent thereto and used for the storage of an automobile and personal effects such as furniture, clothing and pictures (Tr. p. 39), was not likewise within the protection of said section.

There is no necessity to multiply authorities on this point. This court has recently in the case of

*Temperani v. United States,* 299 Fed. 299,

declared under identical circumstances that such a garage constituted a part of the private dwelling of the defendant and was entitled to all the protection and all the immunities from search and seizure guaranteed by the Fourth and Fifth Amendments to the Federal Constitution and by Sec. 25 of Title II of the National Prohibition Act.

It furthermore quoted with full approval and inferentially adopted as a rule to be applied in this circuit the holding of the court in

*Bare v. Commonwealth,* 122 Va. 783, 94 S. E. 168.

This case under a parallel liquor law held that the term "dwelling house" had the same significance as at common law, that a long line of authorities had established "dwelling house" as being synonymous with "mansion house" and as including both the main dwelling and all that cluster of buildings surrounded by a common enclosure and embraced within the term "curtilage". It, therefore, necessarily would include the shed in the instant case which is conceded by the Government to have been an adjunct of the private dwelling of the plaintiff in error and surrounded by a common enclosure.

The same rule appears in

*Keefe v. Clark,* 287 Fed. 372,

at page 373, where the court says:

> "The place where the liquor was stored was partitioned off and could be entered through a locked door, the keys of which were held by

> Keefe. It was regarded as his personal storeroom, forming a part of the apartment which constituted his private dwelling within the meaning of Sec. 25, Title II of the Act."

In

*United States v. Slusser,* 270 Fed. 818,

at page 819, the court said:

> "The right of the people to be secure in their house and effects against unreasonable searches and seizures is not limited to dwelling houses but extends to a garage used as this was personally and for hire."

By necessary implication

*United States v. Kelih,* 272 Fed. 484, and

*United States v. Bonner,* 285 Fed. 293,

hold that a cellar is part of the dwelling house. So it is held in

*State v. Blumenthal,* 203 S. W. 36,

that burning barn and outhouse even though not contiguous to a main dwelling is arson.

So in

*Pitcher v. People,* 16 Mich. 142,

it was held that a barn is a part of a dwelling house as used in burglary statutes.

So in

*Daniels v. Commonwealth,* 4 S. W. 812,

it was held that all buildings within the same common enclosure and used by the same family are considered as parcel of the mansion.

To the same effect are

*Devoe v. Commonwealth,* 44 Mass. 316;
*Mitchell v. Commonwealth,* 11 S. W. (Ky.) 209.

These citations could be multiplied indefinitely but in view of the expressed opinion of this court in the Temporani case and its full approval of the statement of the law contained in *Bare v. Commonwealth,* supra, we conceive that no further argument or citation of authority is necessary to establish the proposition that the garage and the shed on the property of plaintiff in error surrounded by a common fence and used exclusively by Forni as a dwelling house for a period over three years prior to the warrant issued herein constituted the same a part of his private dwelling and subject to search only on the production of an affidavit containing facts giving rise to a reasonable belief that a sale of liquor had been made therein.

As respects the shed regardless of whether it be considered a part of the dwelling house or not the affidavit is fatally defective. It merely avers that affiant saw therein

> "quantities of liquors without evidence of tax being paid."

It does not aver that the liquor is intoxicating; it does not aver therefore that the liquor was subject to tax, although that would be here immaterial, nor does it aver that in fact the tax was not paid; *non constat* the liquor may have been water. That

an indictment charging one with unlawful possession of liquor and failing to declare that it is intoxicating is defective is held in

*United States v. Boasberg,* 283 Fed. 311.

Assuming, however, that the shed is a part of the dwelling house, there is not even an attempt to aver that any sale of any liquor was made therein. Therefore, under no circumstances could a warrant for the search of said shed and seizure of any property therein for violation of the Prohibition Act properly issue.

As respects the garage the affidavit charges

> "that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½ per cent alcohol illegally acquired are stored and traded in from this garage."

We submit respectfully that the above consists solely of hearsay, information and belief, and conclusion, and does not contain one single fact required by Sec. 5 quoted hereinabove as a necessary basis for a search warrant.

The law is well established in the Federal courts that while the facts required to be contained in an affidavit of this nature need not be such as would insure a conviction in a subsequent trial, nevertheless they must be facts personally known to the affiant and competent to be testified to by him as a

witness on the trial of the case. One of the leading cases on this subject is

*Ripper v. United States,* 178 Fed. 24.

Here the affidavit stated that the affiant had good reason to believe and did believe that the accused was unlawfully engaged in the business of manufacturing oleomargarine, with intent to defraud the United States. In holding that this affidavit was defective and that evidence secured on a search based on a warrant issued thereon was inadmissible, the court said:

> "The affidavit on which the warrant was issued set forth no facts from which the existence of probable cause could be determined, nor did the warrant itself recite the existence of such cause. * * * The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause or there should be a hearing by him with that purpose in view. The immunity guaranteed by the constitution should not be lightly set aside by a mere declaration of a non-judicial officer that he has reason to believe and does believe, etc. The undisclosed reason may fall far short of probable cause."

In

*Veeder v. United States,* 252 Fed. 414,

writ of certiorari denied, the court says, stating the above general rules:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises, but facts—which, when the law is properly applied to them tend to establish the necessary legal con-

clusion or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by the rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accurer to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser."

Applying these principles to McIsaac's affidavit we observe that not a single *statement of fact* is verified by his oath. All he swears to is that he has good reason to believe and does verily believe so and so. He does not swear that so and so are true. He does not say why he believes; he gives no facts or circumstances to which the Judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts and under our system of government the accuser is not permited to be also the Judge."

In

*United States v. Ray and Schultz,* 275 Fed. 1004,

the affidavit in question read that affiant

"has good reason to believe that in and upon * * * a fraud upon the Government of the

> United States has been and is being committed, that is to say, that the said J. W. Beaton and John Doe * * * are engaged in the unlawful sale and possession of intoxicating liquors * * *."

The court in holding such an affidavit insufficient declared, p. 1006:

> "It is, of course, entirely clear that under the constitutional as well as the statutory provisions thus applicable the sufficiency and validity of the search warrant under consideration must be tested and determined by the result of the inquiry whether it was based upon a sworn statement of facts tending to show probable cause for the belief that proper grounds for the issuance of such search warrant existed or whether on the other hand the latter was based merely upon statements, although sworn to, of *belief*."

Almost identical with the affidavit in the instant case is that in

*United States v. Harnich,* 289 Fed. 257,

where the affidavit reads:

> "Through investigations made by him and information he has obtained he has reason to know and believe and does therefore know, believe and aver that the National Prohibition Act is being violated by the use of a part of certain premises * * * for the making, secreting and selling of whisky, gin, beer or other kinds of intoxicating liquors for beverage purposes * * *."

In holding this affidavit wholly insufficient the court says (p. 261):

> "It is thus perfectly apparent that no *facts* whatever are set forth tending to establish the

> grounds of the application or probable cause for believing that they exist and no facts are alleged which justify the conclusion of law that the National Prohibition Act has been violated, nor are they sufficient to justify the issuance of a search warrant."

In

*Giles v. United States*, 284 Fed. 208,

the affidavit merely declared that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquors at his drug store. The court held this wholly insufficient, and declared that had the affiant been called as a witness (p. 214),

> "he would have been required to state what he saw or heard or smelled or tasted; that is to give evidence on which the jury under instructions of the court could determine both as to the possession of liquor, as to whether it was intoxicating liquor and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not in form on information and belief and that he bravely swore that Giles had illegal possession of intoxicating liquor does not make his statement legal evidence of fact. It is not enough that the form of this affidavit that the affiant *might* have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury and the facts, and not his conclusion from the facts, should have been before the commissioner."

In

*United States v. Kaplan,* 286 Fed. 963,

the court declares, discussing the nature of the facts which the affidavit must contain (p. 969):

> "Furthermore the evidence must be such 'as would be admissible upon the trial of a case before a jury.' * * * As illustrative of this such evidence used as the basis of a warrant has been animadverted on as 'merely hearsay information' * * *. 'The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function and it cannot be delegated by the Judge to the accuser'."

In

*United States v. Kelih,* supra,

the court declares (p. 488),

> "If it (search warrant) was issued on the showing made by the affidavit of Mr. Kiggins 'that a violation of the National Prohibition Act has been committed and affiant states that he has reason to believe that there are illegally manufactured liquors and an illicit still now concealed in or on the premises,' etc., is insufficient of itself to warrant the judicial officer to find that a violation of the National Prohibition Act has been in fact committed. The witness attempts to find the ultimate fact which must be ascertained by the officer authorizing the issuance of the warrant."

In

*United States v. Dziadus,* 289 Fed. 837,

the affidavit on which the warrant was based for the search of the residence of the defendant declared:

> "* * * is as I have reason to believe and do believe from reliable information, and by

> further reason of the fact that said place was raided in August, 1922, and a still found being used for the purpose of unlawful storing, possessing, keeping and selling intoxicating liquor."

In holding this wholly insufficient the court declares (p. 840):

> "The provisions of the statute are plain. No warrant shall issue to search any private dwelling unless facts are adduced before the commissioner tending to establish that it is being used for the unlawful sale of intoxicating liquor and no warrant shall issue for houses used for other purposes than dwellings unless facts tending to establish probable cause of believing the law is being violated are reduced to writing and sworn to before the officer issuing the writ. Affidavits of search warrants based on information and belief alone are wholly insufficient for a basis of issuing such warrants (cite cases). No search warrant shall issue based upon suspicion, belief, rumors or surmises (cite cases)."

See also in this connection:

*United States v. Armstrong,* 257 Fed. 506;

*United States v. Kelly,* 277 Fed. 485;

*Salata v. United States,* 286 Fed. 125;

*Central Consumers Co. v. James,* 278 Fed. 249;

*United States v. Ilig,* 288 Fed. 939;

*Jozwich v. United States,* 288 Fed. 831;

*United States v. Borkowski,* 268 Fed. 408;

*United States v. Pitotto,* 267 Fed. 603;

*United States v. Rykowski,* 267 Fed. 866.

In the only case in this Circuit in which the question whether information received from a third party, whose identity is not disclosed in the affidavit, is sufficient to authorize the issuance of a warrant (*Vachina v. United States,* 283 Fed. 35), the question is expressly not passed on. However, the above citation of authority at perhaps unnecessary length lays down what is undoubtedly the overwhelming weight of authority as well as the sound rule to be followed and we apprehend that this court will likewise subscribe thereto.

Applying the rules above set forth to the affidavit of D. W. Rinckel in the instant case, we have hereinabove seen that there are no allegations whatever in respect to the shed save that affiant saw quantities of liquor therein. Certainly not a fact raising or warranting a reasonable belief that a crime was being committed.

As respects the garage the affidavit (Tr. p. 50) declares:

> "that affiant has been informed that liquors are taken to and from said garage, both night and day."

Under all of the cases above cited this is pure hearsay, not a fact within the personal knowledge of affiant and hence not a basis for the issuance of a warrant.

The affidavit concludes:

> "that affiant has reason to believe from said information and from inspection of said garage that liquors in excess of ½ per cent alcohol

illegally acquired are stored and traded in from this garage.''

Again applying the rule of the above cases: So much of this averment as is based on information is clearly not a statement of a fact. As to the balance thereof, we respectfully urge that a declaration that from the inspection of said garage affiant has reason to believe that liquors are traded from said garage and that said liquors contain in excess of ½ per cent alcohol and are illegally acquired are pure conclusions of the affiant and contain no single statement of fact. It is inconceivable that from a mere inspection of the garage from the outside that the affiant could determine that liquors were traded from said garage. Disregarding the additional feature that there is no averment of a sale therein, in *haec verba,* there is no fact disclosed on the basis of which the officer issuing the warrant could reach the conclusion that the liquor was intoxicating; that it was illegally acquired or that it was being sold. Theoretically such may have been the case, and theoretically affiant may have had facts within his personal knowledge justifying such conclusions, but the affidavit is barren thereof.

Even conceding that the affiant may be considered to have averred facts showing the possession of liquor in the garage it certainly cannot be claimed that there is a single fact showing a sale.

The necessary conclusion from the authorities cited above as applied to the affidavit herein is that

the warrant authorizing the search of the premises of the plaintiff in error should not have been issued, and therefore, no evidence acquired through the search and seizure could be introduced at the trial of the plaintiff in error.

The only evidence at the trial in regard to the possession of liquor by the defendant was the testimony of Rinckel that he had seized certain enumerated liquors, and the only witness for the Government conceded (Tr. p. 69) that he never saw liquor being sold on the premises. Such being the case and the plaintiff in error having made seasonable application for the return of the seized property, its exclusion as evidence and the exclusion of all information obtained through the illegal search, and having preserved his rights by proper exceptions (Nos. 1, 2, and 6) there is absolutely no evidence to support a conviction of the plaintiff in error either on the charge of unlawful possession of liquor or on the charge of maintaining a nuisance involving the possession of liquor for the purpose of sale.

The return on the search warrant (Tr. pp. 62, 63) does not appear to be verified, nor does it appear therefrom that a copy of the warrant together with a receipt for the property taken was given to the person from whom the property was taken as required by Sec. 12 of Title XI of the Espionage Act, 40 Stat. 228. Such a failure in view of the clear requirements of the statute was held by the Circuit Court of Appeals for the First Circuit in *Giles v.*

*United States* (supra), to render the search and seizure illegal and prevent the use at the trial of any evidence or information secured therein. The same rule was subsequently reiterated in the case of

*Murby v. United States,* 293 Fed. 849,

and for this additional reason the search and seizure in the instant case were illegal and no evidence secured thereunder could be properly introduced at the trial of the plaintiff in error.

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## IV.

**THE SEARCH WARRANT HAVING BEEN ILLEGALLY ISSUED THE LIQUOR SEIZED THEREUNDER SHOULD HAVE BEEN RETURNED.**

Exceptions 1 and 2 were taken to the order of the court denying petitions respectively to return personal property (Tr. p. 51), and for the return of personal property and exclusion of evidence. (Tr. p. 64.) In so far as the motion for return of personal property illegally seized is concerned we desire at the outset to concede that there is a conflict of opinion in the various Circuits as to whether it automatically follows that property illegally seized must be returned without a showing on the part of the applicant for its return that he was lawfully in possession at the time of seizure. To this effect are:

*United States v. Kaplan,* 286 Fed. 963;
*United States v. Jensen,* 291 Fed. 668;
*United States v. Dowd,* 273 Fed. 600;
*United States v. Alexander,* 278 Fed. 308;

*United States v. Rykowski,* 267 Fed. 866;
*United States v. Dziadus,* 289 Fed. 837;
*Haywood v. United States,* 268 Fed. 795;
*Voohries v. United States,* 299 Fed. 275.

Some of the above cases involve stills and other articles employed in the illegal manufacture of liquor which under no circumstances can be lawful subject of property.

*United States v. Rykowski,* and
*Haywood v. United States,* supra.

Some are based on the failure of the petitioner to allege that he was the owner of the property seized as in *Voohries v. United States,* supra. The others flatly affirm that adirect obligation is cast on the petitioner by the Prohibition Act to demonstrate his right to possess the liquor as a condition precedent to its return.

The weight of authority and, in our opinion, the sounder rule is that where a warrant has been illegally issued, all proceedings thereunder are void and the parties must be restored to their original status. This should be particularly true in the case of liquor illegally seized from a private dwelling wherein the statute expressly declares it may be lawfully possessed. To this effect see:

*Godat v. McCarthy,* 283 Fed. 689;
*United States v. Harnich,* 289 Fed. 256;
*United States v. Kelih,* 272 Fed. 484;
*United States v. Ray and Schultz,* 275 Fed. 1004;

*Keefe v. Clark,* 287 Fed. 372;
*United States v. Sievers,* 292 Fed. 394;
*United States v. Quantity of Intoxicating Liquor,* 289 Fed. 278;
*United States v. Vigneaux,* 288 Fed. 977;
*United States v. Boasberg,* 283 Fed. 311;
*United States v. Descy,* 284 Fed. 724, and
*Connely v. United States,* 275 Fed. 509,

where the court stated the general rule as follows (p. 511):

"The contention of the Government is that although the seizure may be unlawful yet intoxicating liquors are contraband and under no circumstances should they be returned even though it is impossible to use them as evidence against the accused. The mere possession of intoxicating liquors in a private dwelling house if acquired before the date when the Volstead Act took effect is not unlawful. The National Prohibition Enforcement Act, Sec. 33: Street v. Lincoln Safe Deposit Co., 255 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. There is nothing to indicate when the liquor was acquired and as was stated in the Street case by Mr. Justice Clark: 'An intention to confiscate private property even in intoxicating liquors will not be raised by inference and construction from provisions of law which have ample field for their operation in effecting a purpose clearly indicated and declared'."

"If the seized property could not possibly be lawfully in the possession of the accused such as an illicit still (*U. S. v. Rykowski,* D. C. 267 Fed. 866), stolen goods, smuggled goods, implements of crime (*Haywood v. U. S.,* C. C. A. 268 Fed. 795, 803) and the like, then resistance to a motion to impound would be of little avail.

> However, the Government cannot call upon the accused to explain the possession under the provisions of Sec. 33 of the Volstead Act under the circumstances of this case as the possession may be upon an hypothesis just as consistent with innocence as it would be with guilt, a forfeiture should not result. The property unlawfully taken from the possession of the petitioner without a search warrant must be restored."

Finally, in this connection we desire to call this court's attention to the case of

*United States v. Mitchell,* 274 Fed. 128,

where in an analogous case in an illegal search of a private dwelling under an affidavit insufficiently charging a sale of intoxicating liquor, Judge Dooling lays down clearly the rule regarding the issuance of a warrant in this case as follows (p. 130):

> "The National Prohibition Act further provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for some business purpose. It should not be difficult to keep within these provisions. If in the attempted enforcement of the Prohibition law a search warrant is applied for the first inquiry of the Judge or commissioner should be as to the character of the place to be searched. If it be a private dwelling, then the inquiry should be 'What evidence have you that this place is being used for the unlawful sale of intoxicating liquor.'
>
> If the officer has no such evidence he should not apply for the warrant or if the Judge or commissioner is not satisfied with the evidence that he should not issue it. If the officer is act-

> ing upon information he should lay all the facts before the Judge or commissioner with the names of the persons from whom this information is received."

The same not having been done, as of course, the court ordered that the property be restored to the petitioner.

It is only necessary to add that in the instant case the petitions of the plaintiff in error for the return of the property and the exclusion of evidence obtained at the search alleged that he was then and at all times mentioned therein the owner of and entitled to the immediate possession of the described personal property.

From the foregoing we submit that if this court considers our objection to the form and contents of the affidavit valid and that the search warrant improperly issued thereon and that the liquor was illegally seized, then the plaintiff in error is entitled to its immediate and automatic restoration.

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## V.

### THERE WAS NO COMPETENT EVIDENCE THAT THE LIQUOR SEIZED WAS INTOXICATING.

The seventh assignment of error (Tr. p. 83) and exceptions 7 and 8 (Tr. pp. 68-69) both refer to the admission of evidence on the part of the witness for the United States as to the intoxicating nature of the liquor seized. The objection was based on the

ground that the questions called for the conclusion of the witness and that no foundation had been laid warranting the admission of his opinion.

We understand in this connection and concede that the rule is well established that a chemical analysis by an expert need not be made in order to demonstrate that the liquor is intoxicating. We understand that the testimony of any competent person who has had experience in connection with liquors may constitute satisfactory proof. Where the witness has had opportunity to taste the liquor, to smell the liquor, to witness its effect on persons imbibing it, or where the liquid is purchased as wine, whisky, beer or under any other designation connoting intoxicating liquor or where the price paid for it indicates its nature, we concede that evidence of such facts will supply the foundation entitling the person individually cognizant thereof to testify. We understand that the following cases go no further than the above rule:

*Singer v. United States,* 278 Fed. 415;
*Heitler v. United States,* 280 Fed. 703;
*Pennacchio v. United States,* 263 Fed. 66;
*Strada v. United States,* 281 Fed. 143,

and similar cases.

However, we do not feel that a person who has qualified merely by having seen some liquor in a bottle, so far as the records show, unlabelled and at a considerable distance without evidence of a nature indicated as above is properly qualified to testify as

to its intoxicating qualities or as to its alcoholic percentage.

We respectfully submit that the true rule as to the qualification of an ordinary non-expert witness is contained in:

*Re Liquor Seized,* 197 N. Y. Supp. 758.

Here the testimony was that the affiant

"Saw intoxicating liquors sold."

(p. 760):

"We are confronted with a more serious question, however, when we assume as a naked fact that the complainant could see that the drinks were drinks of liquor and that such liquor was unlawfully intoxicating. Surely he could not, by simply looking at the liquid, judge that it was intoxicating liquor. That would be incredible. If he saw other things, heard other things, smelled of the liquor or of the breaths of the drinkers, tasted of the liquor himself, or sensed any circumstances whereby he confirmed his own conclusion that it was intoxicating liquor, the complainant is silent in his complaint as to such facts and circumstances."

(p. 761):

"* * * but when he concludes that the drink was intoxicating, without saying how he knows the fact, beyond saying that he saw it, it is equally plain that his statement is a conclusion from the facts unrevealed, which he could have stated, and which might have been the single incredible deduction that it looked like intoxicating liquor. Science has not yet progressed to the point where such a deduction can be drawn through the mere sense of sight of the liquor itself."

For the foregoing reasons we submit that the objection of counsel to the admission of such purely opinion evidence was sound and that in the absence of further qualification of the witness his testimony in this respect should have been excluded.

---

## VI.

### THE COURT ERRED IN EXCLUDING EVIDENCE AS TO THE CHARACTER OF THE PREMISES OCCUPIED BY THE PLAINTIFF IN ERROR AND IN REFUSING TO GIVE INSTRUCTIONS REQUESTED.

The specifications of error 8, 9 and 10 and exceptions 9, 10 and 11, may be considered jointly. They refer to the refusal of the court to permit evidence as to the character of the premises occupied by plaintiff in error and its refusal to give the requested instructions defining the term "private dwelling" and instructing the jury that if the premises occupied by the plaintiff in error constituted a private dwelling they must, to justify a verdict of guilt, find from the evidence either that the premises were being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose. We concede that whether or not the premises constituted a private dwelling was a question of law. Nevertheless, in view of the fact that the possession of intoxicating liquors in a private dwelling is expressly authorized by the Volstead Act, and in view of the fact that there was some evidence before the jury given by the witness

for the Government, as to the character of the premises (Tr. p. 69) it was the duty of the court to instruct the jury, if such were the law, that these premises constituted a private dwelling. Moreover, as regards the nuisance count, while we concede that a private home may constitute a nuisance equally with a business office or premises, nevertheless, the possession of liquor in a private home might not in the eyes of the jury give rise to the same inference and presumptions in regard to the purpose for which it is kept as would the possession of the same liquor under other circumstances. For this reason also the refusal of the court to give the instructions requested was error seriously prejudicing the rights of the plaintiff in error.

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## VII.

**THE ADMISSION OF EVIDENCE CONCERNING PRIOR ARRESTS AND THE INSTRUCTION THAT SUCH EVIDENCE WAS COMPETENT TO PROVE THAT LIQUOR WAS KEPT FOR THE PURPOSE OF SALE WAS PREJUDICIAL ERROR REQUIRING A REVERSAL.**

Over the objection of counsel for plaintiff in error the witness Rinckel was permitted to testify that Forni had been *arrested* by him several times (Tr. p. 65) and that "I *arrested* him four or five times". (Tr. p. 66.)

The objection was based on the ground that the evidence was incompetent, irrelevant and immaterial and that the plaintiff in error was charged only with

the particular offence for which he was on trial. The court overruled the objection on the ground that evidence of previous offenses are admissible where the charge is that of maintaining a nuisance involving the keeping for sale of intoxicating liquor, and our exception No. 3 was taken to such ruling (Tr. p. 65).

Subsequently the court on its own initiative inquired of the witness (Tr. p. 70):

> "Q. You have made *arrest* of this man for violation of the Prohibition law before?
> A. Yes, sir, for bootlegging, he was what is known as 'Slim's Fly Trap Restaurant' there."

The court in its instruction stated (Tr. p. 73):

> "In order to find him guilty on the first count you must not only find that he had liquor there but that he had it there for the purposes of sale; and in determining that you are entitled to take into consideration the fact, if you find it to be a fact the testimony of the witness Rinckel, that he has been *arrested* as a bootlegger before."

We respectfully submit that the ruling of the court on the admission of the evidence above quoted and the instruction thereon, was error seriously prejudicing the right of the plaintiff in error and entitling him to a new trial.

(a) We first desire to point out that Forni never took the stand. Therefore, whatever may be the rule in regard to such evidence by way of impeaching a witness is not here relevant. The evidence being admissible at all was pertinent on only one

theory, i. e., as evidence tending to prove the commission of the offenses for which the plaintiff in error was on trial.

The general rule supported by an unbroken line of authorities in the Federal courts is that proof of collateral offenses is not admissible against the defendant since it merely tends to divert the attention of the jury or the court from the main issue before it or to prejudice the defendant and secure his conviction on the general principle that he is an undesirable person and, therefore, likely to have committed the offense with which he is charged.

The leading case on this subject is

*Boyd v. United States,* 142 U. S. 454 (35 L. Ed. 1077),

where in reversing the judgment of conviction on the charge of murder on the ground that the court had admitted evidence, tending to show that the prisoner had committed other robberies shortly before the time when the killing took place, the court said:

> "They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community,

> and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.''

This rule was again reiterated by the Supreme Court of the United States in

*Hall v. U. S.,* 150 U. S. 76 (37 L. Ed. 1003).

(b) To this general rule there are various exceptions to the effect that where the identity of the accused is in doubt or where intent motive or guilty knowledge are elements of the offense, evidence otherwise competent may not be excluded bcause incidentally it indicates the commission of another offense.

We have no quarrel with the rule of law permitting such evidence in cases properly falling within the scope of these exceptions and for the purpose of this record we may concede that where the charge is unlawful possession of intoxicating liquor or the maintenance of a nuisance involving the possession of such liquor for the purpose of sale, evidence of other sales, evidence of unauthorized transportation of liquor, evidence of contraband articles employed in the manufacture of liquor, and even evidence of prior conviction for violation of the Prohibition Act might have been admissible, but we respectfully insist that where such evidence is admissible it must definitely tend to show the

commission of an offense or else a conviction supported by a proper record must be introduced in evidence. After a thorough search of authorities we have been unable to find a single Federal case or a single well-reasoned case elsewhere holding that evidence of mere prior *arrest* of a defendant is admissible for any purpose whatsoever.

In

*Paris v. U. S.* 260 Fed. 529 (C. C. A. 8th),

the court stating the general rule as above declares:

> "The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. United States, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 282, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 81, 14 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, P. 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, *it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear and conclusive.* Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp,

> 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. La Page, 57 N. H. 245, 259, 24 Am. Rep. 69; Fish v. United States, 215 Fed. 545, 132 C. C. A. 56, L. R. A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit, in the case last cited, well said: 'Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case'."

On this ground the judgment of the District Court where the defendants were convicted of unlawfully dealing in narcotics was reversed, because of the admission of evidence that they had been *arrested* for a similar offense in another district nine months before.

In

*Hatchet v. United States,* 293 Fed. 1010,

a similar rule is enunciated as follows:

> "The foregoing decisions are determinative of the question here. There was no issue as to appellant's identity; he did not testify, and yet the government was permitted to place before the jury evidence tending to show that he was a man with a criminal record. While there may have been, and probably was, competent evidence warranting conviction, it would be going far to say that appellant was not preju-

> diced by the admission of this incompetent evidence. He was entitled to a fair and impartial trial, and that he could not have, after it was made to appear, through the introduction of incompetent evidence, that his picture adorned the rogues' gallery, in connection with his *arrest* in Philadelphia for a similar offense; in other words that, with criminal propensities, he had operated elsewhere and under another name."

By implication this same rule is adopted by this court in

> *Hazelton v. United States,* 293 Fed. 384 (C. C. A. 9th),

where a judgment of conviction on the charge that the defendant had maintained a public place where moonshine whisky was sold was reversed because of admission of evidence of the conviction of the defendant in a police court for disorderly conduct. Speaking through Hunt, Circuit Judge, this court said:

> "Doubtless a record of prior *judgment* and a *plea of guilty* of having kept in June 1922 a place where intoxicating liquor was sold, would have been admissible against defendant upon the ground that such an offense was connected with the charge under investigation as part of a continuing offense * * *.
>
> For the reason therefore, that reception of the evidence conflicted with the firmly routed rule that the prosecution may not initially assail defendant's character, the judgment must be reversed and the cause remanded with directions to grant a new trial." (Our italics.)

In

*Gart v. United States,* 294 Fed. 66 (C. C. A. 8th),

where the defendant was charged with the unlawful possession and unlawful sale of narcotics, evidence was admitted that the defendant at a different time and place upon a street in Denver had delivered a package to another party. No further evidence was offered as to the nature of the contents of the package. In reversing the case, the court said:

> "It must be apparent that such a line of testimony, if not properly admissible, would be highly prejudicial. Standing as evidence before the jury it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately, and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.
>
> The scope and purpose of testimony concerning similar offenses is limited, as has been laid down in the Supreme Court of the United States in the cases of Boyd v. United States, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1077, and Hall v. United States, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003. Only in exceptional cases is the proof of such transactions admissible. *Where a case falls within the exception, the proof must be clear and convincing.* It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof

> of similar offenses, for the reason that *in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance.*" (Our italics.)

and the court here repeats the language of Paris case quoted hereinabove at page 41.

In an analogous case,

*United States v. Lindquist,* 285 Fed. 447 (D. C. Wash.),

in connection with evidence of a prior offense the court said:

> "A statute providing for severer punishment on conviction for second offense is highly penal, and must be strictly construed. 16 Corp. Juris, 1339; 25 R. C. L. p. 1081. The second offense charged was not judicially determined until June 8, subsequent to the commission of all the offenses charged. The testimony, therefore, of this offense, relating to a separate and distinct offense, was prejudicial to the defendant Lindquist, tending to show that the defendant Lindquist was a bad man for which he was not on trial, and was not proper for the jury's consideration in determining the issue before it. People v. Fabian, 192 N. Y. 443, 85 N. E. 674, 18 L. R. A. (N. S.) 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100; State v. Findling, 123 Minn. 413, 144 N. W. 143, 49 L. R. A. (N. S.) 449."

In

*Woods v. United States,* 279 Fed. 706 (C. C. A. 4th),

in a trial arising under alleged violation of the Harrison Anti-Narcotic Act, the admission of evidence of an offer to compromise for a separate and distinct

offense was held reversible error, the court saying (p. 712):

> "What was done respecting this offer of compromise the record does not show. We think it related too remotely to the offense here charged to be admitted as an offense of guilt. We can but feel that this evidence tended to prejudice the defendant and should not have been brought into the case."

In

*State v. Wheeler,* 130 Pac. (Kans.) 656,

evidence of the prior *arrest* of the defendant and conviction of *other* defendants for another offense was held reversible error.

In

*State v. Lyle,* 118 S. E. (S. C.) 803,

the court says (p. 811):

> "It is also to be remembered in this connection that before guilty intent may be inferred from other similar crimes the extraneous crimes must be established by legal and competent evidence."

In

*People v. Macijeuski,* 128 N. E. (Ill.) 489,

the court says:

> "The testimony objected to tended to show that certain plaintiffs in error had been *arrested* for other crimes. Of course, this evidence was improper."

So in

*People v. Bush,* 133 N. E. (Ill.) 201,

the court said:

> "It was incompetent in this indirect way to prove that other criminal charges were pending against defendant and it was error for the court to permit it."

and the court has gone so far in Illinois as to hold that:

> "Even where proof of a former conviction is admissible it must be made by producing the record." (*People v. Reed,* 122 N. E. (Ill.) 806.)

So in

*Allen v. State,* 225 Pac. (Ariz.) 332,

it was held improper to inquire as to how many times a defendant had been previously searched, the number of times his place had been searched, and the number of times he had been arrested for violation of law.

So in

*People v. Gordon,* 204 N. Y. Supp. 184,

the court says:

> "Many of the questions propounded by the court as affecting the character and credibility of the defendants were incompetent, particularly inquiries concerning *prior arrests.*"

In

*Baxter v. State,* 110 N. E. (O. St.) 456,

the following is quoted from the syllabus prepared by the court:

> "Where evidence of other offenses of a similar character is competent to prove intent and the accused has not heretofore been convicted of such offenses the burden is on the State to prove that the accused is guilty of such other

offenses by the same degree of proof required in all criminal cases.''

See also

*Lankford v. State,* 248 S. W. (Tex.) 389;
*Haley v. State,* 209 S. W. (Tex.) 675;
*Kellum v. State,* 238 S. W. (Tex.) 940;
*Corp. Juris.,* Vol. 16, p. 592.

(c) Applying the law enunciated by the above and numerous other cases to the instant case, it must be clear, first, that under no conceivable theory could testimony that the plaintiff in error had been *arrested* before be admissible. There is no word of evidence that he was ever convicted, there is no word of evidence as to the facts involved in connection therewith from which this jury could properly conclude that he had committed the prior offense, nor in the first part of the objectionable testimony is there even any specification as to the nature of the offenses for the alleged commission of which the prior *arrests* were made; nor finally does it appear whether they occurred one day or 50 years prior to the trial involved.

The ruling of the court that testimony concerning prior *offenses* was admissible was undoubtedly correct, in view of previous rulings in this court (*Strada v. U. S.,* 281 Fed. 143), but wholly inapplicable in view of the fact that only testimony as to prior *arrests* was offered. Considering the meagre state of the testimony as to this particular offense, even conceding for the moment that all of it was ad-

missible, no argument is necessary to show that the charge of the court in its instructions that the evidence of prior *arrests* could be considered by the jury as tending to show possession of liquor with the intent of sale was necessarily and inevitably prejudicial to this plaintiff in error.

It is true that no exception was taken to this part of the instruction. Nevertheless, the exception was properly taken to the testimony when offered for the first time. (Exception No. 3, Tr. p. 65.) This covered all subsequent testimony along the same lines without further objection.

*Paris v. U. S.,* supra.

And covered the instruction to the jury without a separate exception being noted.

> "It is true as suggested by counsel for the Government that no exception was taken to the charge, but objection was made by the defendants to the evidence as to the Brinson, Mode and Hall robberies, and exception was duly taken to the action of the court in admitting it. That exception was not waived by a failure to except to the charge." (*Boyd v. U. S., supra.*)

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## VIII.

**EVEN ASSUMING THAT ALL THE EVIDENCE BEFORE THE JURY WAS PROPERLY ADMITTED THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT ITS VERDICT.**

The first count in the information charges the maintenance of a nuisance involving the unlawful possession of intoxicating liquor for the purpose of

sale. In support of such a charge it is a rule in some circuits that a nuisance involves the idea of permanence and continuity of the offense.

*United States v. Dowling,* 278 Fed. 630;
*Reynolds v. U. S.,* 282 Fed. 256 (C. C. A. 6th);
*Hattner v. U. S.,* 393 Fed. 381 (C. C. A. 6th).

The weight of authority and the rule in this circuit, however, is to the contrary:

*Parker v. United States,* 289 Fed. 249;
*Feigin v. United States,* 279 Fed. 107;
*Lewisohn v. United States,* 281 Fed. 143.

We submit, however, that the farthest any of the above cases has gone is to hold that a single sale accompanied by circumstances of a habitual violation may support a verdict of guilty of a nuisance charge. In the instant case the only witness for the government, declared (Tr. p. 69):

"I saw no liquor being sold there"

and in the absence of proof of a single sale we submit that the charge of maintaining a nuisance is not supported by a shred of evidence.

As respects the charge of unlawful possession of intoxicating liquor, waiving for this particular purpose the contention that such evidence as was produced was illegally secured, we nevertheless submit that mere proof that intoxicating liquors were possessed and owned by the plaintiff in error in his private dwelling falls far short of proving him guilty of any criminal act. The law expressly provides (Sec. 33 of the Volstead Act), that the pos-

session of liquor in a private dwelling shall not be illegal. We maintain that such is the rule notwithstanding the presumption that arises from the mere possession of intoxicating liquor and the existence of the burden of proof created by Sec. 33 of the Volstead Act. In this connection see

*United States v. Descy,* 284 Fed. 724 (p. 726), where the court says:

> "It is apparent, of course, that upon the trial of the information the burden of proof and unlawful possession rests upon the United States and it is not sustained merely by proof of the finding of intoxicating liquors in the plaintiff's private dwelling, as there is no requirement that this liquor shall be reported or that a permit be secured. No presumption can arise against the possessor from the fact of possession alone to require of a defendant who appeals to the court to protect him against an unlawful invasion of his dwelling house and an unlawful seizure by officers acting in direct violation of the provisions of the National Prohibition Act in respect to search warrants. That he assume the burden of proof that his possession is not unlawful is very near to creating a presumption of guilt from proof of circumstances which are entirely consistent with innocence. Wholly to apply to defensive proceeding of this character the rule concerning the burden of proof contained in Sec. 33, in substance removes the presumption of innocence and imposes upon the defendant the burden of proving innocence in a proceeding which is incidental to a criminal complaint in which the burden of proof of guilt rests upon the United States."

In

*U. S. v. Illig,* 288 Fed. 937, 945,

the court says:

> "The pleader wholly ignores the fact that possession of intoxicating liquors is not made an offense under the 18th Amendment; that Congress did not attempt in the Volstead Act, nor would they have had the power to make the mere possession, stripped of every other act, a crime. Possession can be made an offense, only where prohibited for the purpose of making effective that which the amendment prohibited."

So also in

*United States v. Cleveland,* 281 Fed. 249,

where the court after a thorough analysis of the provisions of the act wherein the terms "action" and "prosecution" are used, comes to the conclusion that the clause imposing a burden of proof as respects lawful possession and acquisitions of intoxicating liquor applies only in a civil action concerning the same and does not apply in criminal prosecutions.

To the same effect is

*United States v. Grossen,* 264 Fed. 459,

where the court says:

> "It follows that the relator in the petition has established a prima facie right to own and possess liquor in the premises in question because she was not using the premises for the purpose of conducting the saloon, but they were occupied by her as her dwelling * * *.
>
> Sec. 3, prohibits possession 'except as authorized in this Act'. Sec. 33 contains one of the exceptions authorized. Congress has made the

exception applied to any one possessing liquor in a private dwelling while used and occupied by him (or her) as his (or her) dwelling only, * * *."

---

## IX.

### ADDITIONAL ERRORS.

In addition to the major errors hereinabove ~~in~~ and at length discussed, we desire briefly to refer to the remaining assignments of error and the exceptions covering the same.

Assignment of error No. 5, which is exception No. 4, relates to the refusal of the District Court to strike out the answer of the witness Rinckel. In response to the question:

> "Q. Why did you go there, Mr. Rinckel?
> A. I got reports there was a large amount of liquor."

That this is hearsay is obvious. That it is prejudicial is likewise apparent. Its effect was to indirectly and improperly give the jury to understand that there was liquor stored in the premises and that there were various people who were in a position to testify to that effect and that there was something improper in connection with the possession thereof.

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## X.

### CONCLUSION.

We respectfully submit that the foregoing authorities and arguments definitely establish:

(1) That the premises located at No. 2933 Webster Street, the garage thereunder and the shed in rear thereof surrounded by a fence and within a common enclosure constituted a private dwelling, as said term is used in the Volstead Act.

(2) That the affidavit on which the search warrant was based was wholly defective as respects the shed, and as respects the garage it is based on hearsay, information and belief, and conclusions, and contains no single fact tending to show either that there was intoxicating liquor therein; that it was illegally possessed or that any sale was made therein.

(3) That as a result thereof no evidence obtained by virtue of the search under said warrant was admissible at the trial.

(4) That the property thus illegally seized must be returned.

(5) That excluding such evidence from the trial the jury had no evidence whatsoever before it on which to support any verdict of guilt on any charge.

(6) That the admission of evidence concerning prior *arrests* and the instructions referring to the same were improper and prejudicial.

(7) That in consequence the judgment of the court must be reversed.

In conclusion we would call the attention of the court to the fact that the plaintiff in error is now confined in jail undergoing and suffering the sen-

tence imposed upon him and therefore request a speedy determination of the case.

Dated, San Francisco,
October 22, 1924.

Respectfully submitted,
H. S. Young,
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No. 4355

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CHARLES FORNI,

*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

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# BRIEF FOR DEFENDANT IN ERROR

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No. 4355

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES FORNI,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR

### STATEMENT.

Charles Forni, the plaintiff in error, prosecutes a writ of error to the District Court of the Northern District of California to reverse a judgment and sentence of conviction rendered by that court against him on April 10, 1924.

On March 20, 1923, an information in two counts was presented in the said court against plaintiff in error and one George Blake. In the first count of the information it was charged, in the usual phraseology, that on December 26, 1922, at 2933 Webster Street in said City and County they maintained a common nuisance and a large quantity of intoxicat-

ing liquors was set forth as being kept for sale on the premises. In the second count the same parties were charged with the unlawful possession of intoxicating liquor. Both defendants had been arrested and both interposed pleas of "not guilty". The information is set forth at Trans. pp. 3 to 8.

Certain matters appearing on pages 9 to 31 inclusive constitute no part of the record, but it is believed the greater portion thereof has been set forth in the bill of exceptions beginning at page 32.

On March 13, 1923, the defendant Forni interposed his verified petition for a return of personal property, referring therein to a large quantity of various kinds of intoxicating liquor, a list of which appears at Trans. p. 34. There is printed an affidavit in support thereof, but perhaps erroneously, because not verified nor filed until the following July, which was after the motion had been determined. The motion does not pray for any other relief than a return of the liquors. In response to the petition the respondents on March 21, 1923, interposed an answer and with it the affidavit of one D. W. Rinckel in opposition to the petition. (Trans. pp 43 to 47.)

In the affidavit the officer deposed that at times material he was a Federal Prohibition Agent acting under the authority of the Federal Prohibition Director:

> "That there was a building located at number 2933 Webster Street, in said City and County of San Francisco; that underneath the said

> building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress therefrom to any other portion of the building, and that the main entrance into said garage is on and from said Webster St.,"

and further he deposed that prior to December 26, 1922, he and other Prohibition Agents

> "had reliable information that intoxicating liquor, to wit, whiskey, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes was stored, sold and delivered from the garage hereinabove mentioned,"

and he further deposed that pursuant to said information on December 26, 1922, he and another Prohibition Agent

> "went to the said premises and affiant, looking through an open door saw in plain sight in said garage about 25 cases of intoxicating liquor, to wit, Scotch whiskey, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, which said intoxicating liquor in said garage was in cases, and which said cases were marked 'D. T. Co. Vancouver, B. C.,' the said 25 cases each contained 12 bottles; that the said intoxicating liquor was untax-paid and contained no Internal Revenue stamps whatever; that in the rear of said premises in a shed, affiant then and there saw through an open door,"

then describing a large quantity of intoxicating

liquors, including a hydrometer and a glass gauge tube. (Tr. p. 58.) Affiant further declared that on said day he secured a search warrant based upon the above facts and entered the garage and seized the liquor therein and entered the shed and seized the liquors therein; that all the barrels, including those containing liquors as well as empty barrels, were marked "Vancouver, B. C." Affiant further stated that neither he nor any of the other agents present at any time entered the dwelling of said defendant; that while he saw liquor in the residence he did not, nor did any other Agent search for, seize or attempt to seize any of the intoxicating liquor in the said residence of the said defendant. (Tr. pp. 59, 60.) The further statement was made

> "That at the time of the search and seizure under the said search warrant affiant then and there arrested one of the defendants herein, to wit, George Blake, for a violation of the said National Prohibition Act, and the said George Blake then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That thereafter on said 26th day of December, 1922, approximately one-half hour after the above said arrest, the defendant, Charles Forni, came to said premises and affiant then and there arrested the said defendant for a violation of the said National Prohibition Act, and the said Charles Forni then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That at all times herein mentioned said liquor was illicit and contraband." (Tr. p. 60.)

The petition was heard, as far as the record shows, on March 22, 1923, the court considering the verified petition, the affidavit of Officer Rinckel and also the search warrant and affidavit therefor made by the same officer referred to in his affidavit. The search warrant appears at Trans. p. 47, and the affidavit forming the basis thereof on p. 49. In the affidavit the same officer deposes that he had reason to believe, and did believe,

> "That within a certain house, store, building or other place, in the Northern District of California, to wit:
>
> A certain basement garage at No. 2933 Webster Street, San Francisco, California, and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit, illicit liquors which is being used as the means of committing a felony, to wit, a violation of the National Prohibition Act of the statutes of the United States";

and he further stated that the facts tending to establish the grounds of the application and probable cause for believing such facts exist were as follows:

> "That this affiant on the 26th day of December, 1922, visited said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of one-half

> per cent alcohol illegally acquired, are stored and traded in from this garage." (Tr. p. 62.)

The court denied the petition.

The case came on for trial on April 10, 1924. Three days prior thereto the defendant Forni interposed his verified petition praying for an order prohibiting the United States of America "from introducing the said personal property in evidence at the trial of the said action," referring to the same liquors. The allegations of the petition last filed were not substantially different from the first petition, but there had been filed in the meantime the affidavit of petitioner appearing at Trans. p. 37, but this was not substantially dissimilar from the new affidavit filed April 7, 1924, appearing at Trans. pp. 54 and 55. The affidavit declared in substance that affiant and his brother resided on the premises for about three years prior thereto and occupied the entire premises as a private dwelling house and described the premises as a two-story frame building and basement thereof, and an outhouse or shed about 30 feet from the rear of the building, the building and shed being within the common enclosure, but the affidavit further stating

> "That the said basement and said shed from time to time during said period and in particular on the said 26th day of December, 1922, was used by affiant and his said brother for the purpose of therein storing in addition to said property seized as aforesaid, their personal effects

such as furniture, clothes, pictures and the automobile of affiant";

and it was said that Rinckel gained access to the shed by scaling the wall surrounding the same.

In answer to the last petition the government made the same showing as it made in response to the first. The search warrant and affidavit in support thereof being also before the court and considered, the court denied the petition. (Trans. p. 64.)

At the commencement of the trial it was developed that the defendant Blake was not present. A continuance was requested on his behalf and refused by the court and the trial proceeded with. Thereupon the government called a single witness, D. W. Rinckel, whose testimony appears at Trans. pp. 65 to 70. Omitting rulings as to evidence, the testimony of the witness was as follows:

"I am and for 4 years prior to this date have been a prohibition officer. I have known Charles Forney, also known as 'Slim Forney,' as long as I have been on the prohibition force. I have arrested him several times."

"Q. About how many times, Mr. Rinckel?" (Tr. p. 65.)

"A. I arrested him 4 or 5 times. I had occasion to go to No. 2933 Webster Street, San Francisco, on December 26, 1922."

"Q. Why did you go there, Mr. Rinckel?

A. I got reports there was a large amount of liquor."

"I went there with Agent Corey, the driver and another agent. The place is a residence house, with a garage underneath, and sheds in the back."

"Q. Did you observe anything when you went there on the 26th day of December, 1922?

A. Yes, sir." (Tr. p. 66.)

"A. We were watching that place to get a delivery of liquor coming out of there; and a truck came out of there, and the agents searched the truck, and there was nothing on it, and to make sure that this informant was right, we went up there and made an investigation, and found this liquor in the back sheds. We first observed that from another lot, the liquor in the back shed, and climbed into the yard and saw into the basement and saw the liquor piled up there, and went to the United States Commissioner and got a search warrant, and went back and seized the liquor."

"Q. The liquor seized, Mr. Rinckel, consisted of 25 cases of Scotch whiskey? A. Yes, sir.

Q. Two 50-gallon barrels of whiskey?

A. Yes, sir.

Q. One 50-gallon barrel of whiskey?

A. Yes, sir.

Q. One 50-gallon barrel part full of Sherry wine?

A. Yes, sir." (Tr. p. 67.)

"I found there two 175-gallon puncheons of red wine, one 10-gallon barrel of alcohol; a 5-

gallon can of alcohol; two 50-gallon barrels of brandy; jugs of red wine, 93 quart bottles of red wine; 2 gallon jugs of white wine; a hydrometer and a glass tube. The defendant Forney was not present at the time but came in later. Blake was present. I talked with Blake first and when Forney came in I talked with him. Blake claimed the liquor until Forney came in and then Forney stated that it was his. I am familiar with various kinds of intoxicating liquors."

"Q. And did you observe the general color, appearance and qualities of this liquor, set forth in the information in this case?

A. It was intoxicating liquor." (Tr. p. 68.)

"Do you say from your experience as a prohibition officer that all of this liquor contained over one-half of one per cent of alcohol by volume? A. Yes, sir."

"I placed Forney under arrest and subsequently filed an information."

(Cross Ex.)

"This is a dwelling house with a garage underneath and with outhouses, which were all enclosed with fences. I climbed over the fence and I could see into the basement and see the wine barrels and bottles there, which were in the shed from the adjoining yard and I climbed over the fence and could see into the basement. I saw no liquor being sold there. It was reported to our office that they were taking liquor in and out of there all of the time. The report came from a neighbor next door. (Tr. p. 69.)

"Q. (By the Court). You have made arrests of this man for violation of the prohibition law before?

A. Yes, sir, for bootlegging. He has what is known as 'Slim's Fly Trap Restaurant' there. As to where the liquor came from, I have only Forney's statement. He said he purchased Scotch whiskey from a boat which was lying outside. He bought the liquor 'over the rail' outside; I mean by 'over the rail' outside from a boat which was lying outside, that is the Scotch whiskey had been purchased over the rail from outside." (Tr. p. 70.)

The case against both defendants was submitted to the jury in a charge given by the court on his own motion and both defendants were convicted on both counts. (Trans. pp. 76 and 77.) The charge of the court given orally appears at Trans. pp. 73 and 74; at the close the court asked "are there any objections to the instructions?" (Trans. p. 74.) No objection nor exception was then interposed, except that the defendant Forni excepted to the failure of the court to give two instructions theretofore requested by him, the first being

"If the premises in question were used and occupied by defendant as a private dwelling, to justify a verdict of guilty, you must find from the evidence, either that it was being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose."

and the second being,

"The term private dwelling includes the entire frame building in which the dweller resides

as well as all buildings and outhouses situated within the common enclosure provided that the same are used solely for the comfort and convenience of the dweller and are not used for any business."

Thereupon the defendant Forni was sentenced to be imprisoned for a period of one year in the County Jail of San Francisco and to pay a fine of $500 on the first count, and that he pay a fine of $500 on the second count. There was no motion interposed at any time on behalf of either defendant for a directed verdict.

## POINTS INVOLVED

There are ten assignments of error, to wit:

1) The ruling on the first petition.
2) The ruling on the second petition.
3) The ruling on the respect of testimony as to the amount and character of certain intoxicating liquors.
4) The overruling of the objection to the question "about how many times, Mr. Rinckel?"
5) The overruling of the objection to the question "Why did you go there, Mr. Rinckel?"
6) The overruling of the objection to the question "Did you observe anything when you went there on the 26th of December, 1922?"
7) The ruling permitting witness Rinckel to testify as to his conclusions concerning

liquor seized, he not qualifying as to witness on the subject.

8) Ruling in refusing to permit defendant to produce testimony as to the character of the premises on Webster Street, in that he offered to prove that the premises were his dwelling place.

9) The refusal of the first instruction proposed by the defendant.

10) The refusal of the second instruction proposed by the defendant.

But the substantial proposition here argued is, that certain testimony received by the court was incompetent to be received in the face of objections said to be interposed.

## ARGUMENT

### I

### THE COURT DID NOT ERR IN THE RECEIPT OF ANY INCOMPETENT TESTIMONY RELATING TO INTOXICATING LIQUORS.

#### (1) THE RECORD DOES NOT SHOW ERROR.

It will profit here to make certain distinctions and to show what this case is not. There is no question here as to the sufficiency of the evidence to show guilt. There was no motion made at the trial by either defendant for a directed verdict on either count; neither is there any assignment of errors designed to raise the question of the sufficiency of the evidence.

Nor can there be any contention but that the evidence of the witness Rinckel heretofore quoted was entirely *relevant* to be considered in the case as tending to prove the charges set forth in the information. The witness directly deposed to facts showing that the defendants at the premises at No. 2933 Webster Street, San Francisco, had stored in a garage and an outbuilding a large amount of intoxicating liquors aggregating 25 cases or 300 bottles of Scotch whiskey, 254 gallons of other whiskey contained in six barrels, a 50-gallon barrel of sherry, 900 gallons of red wine, 350 gallons of red wine in two puncheons, 15 gallons of alcohol, 100 gallons of grape brandy in two barrels, 55 gallons of wine in jugs, 93 quart bottles of red wine and a 2-gallon jug of white wine, and it was not without significance that there was shown to be *15 empty* barrels, also a hydrometer and glass tube. The liquors so described would be valued at a very large sum. This liquor was, as the defendants themselves put it, "stored" in the garage and in the shed. It was shown further that the defendant Forni, speaking of the Scotch whiskey, said he bought it "over the rail" from a boat lying "outside". While at the time of the seizure defendant Blake, who was present and was arrested, claimed the liquor, the defendant Forni came later and also claimed it. There was the further fact that while the agents watched before going up to observe the premises they saw a truck come out and searching it found nothing on it. While these liquors were not put in evidence,

the Agent Rinckel testified as to the facts in regard to the defendant's possession of the same.

The evidence was relevant.

But the contention is that evidence concerning the liquors in question was *incompetent,* and that it should not have been received because its receipt was in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. The evidence was *apparently* competent and the burden was on the defendant to show preliminarily on *voir dire* such outside facts as would serve to show the incompetency of the evidence. Such a showing is claimed to have been made and the defendant's contention in that behalf presents the substantial question for consideration by the court. To meet the rule that such a collateral issue cannot ordinarily be raised at the trial, the defendant Forni made certain antecedent motions. Some months before the trial he moved for a *return* of the liquors, supporting the motion by his verified petition and putting in evidence also certain search warrant proceedings instituted at the time of the seizure of the liquor. His contention was met by the affidavit of the witness Rinckel. Upon consideration, the motion was denied. It will be noted that defendant did not move *for the exclusion from evidence* of either the liquors or of any information obtained by the agents upon any search. But the mere withholding of the liquors from the defendant standing alone could have had no effect upon the

event of the trial. Apparently appreciating such a point, the defendant moved at the opening of the trial "that an order be made prohibiting the United States of America from introducing said *personal property* in evidence at the trial of said action". He did not move for the exclusion of any *information* obtained by the agents. Upon substantially the same showing the court denied the motion.

But at the trial the government did not offer any of the said personal property in evidence. The evidence of the agent in describing what he saw was deemed by the government sufficient to convince the jury of the defendant's guilt and it did not find it necessary to make use of the demonstrative type of evidence frequently made use of when liquors are put in evidence and exhibited to the jury. Thus the court's denial of the precise thing asked on the motion—and it will not be presumed that its denial went any further—cannot be held to have affected in any manner the subsequent trial proceedings.

It is undoubted that the principle now contended for, if the contention were well founded in fact, would also have served to exclude from evidence statements by the agent of what he saw and found upon an examination of the premises in making the questioned search. But turning to the record of the testimony of the witness Rinckel it is seen that objection to the testimony as to such statements was not made until the government had substantially proven its case. There was nothing in any ante-

cedent objection that would have required the court to anticipate and exclude the evidence on its own motion. Thus, as will be seen from the record (Tr. p. 67) the witness Rinckel was permitted without objection to testify at length as to incriminatory matters observed by him on his visit to the premises. He said without objection that he and the Agent Cory and two others were watching the place to get a delivery of liquor coming out of there; that a truck came out, was searched by the parties, nothing was found on it, thereupon the agents went up, made an investigation and found this liquor in the back shed. *They first observed that from another lot,* the liquor in the back shed; they climbed into the yard and saw into the basement and saw the liquor piled up there, immediately got a search warrant and returned and seized the liquor. And the witness, still without objection, was allowed to describe the liquor so seized as 25 cases of Scotch, three 50-gallon barrels of whiskey, and a 50-gallon barrel of wine. Thereupon, for the first time an objection to the testimony was interposed, although the precise question asked *had just been answered.* (Tr. p. 67.) The witness testified further, also without objection, as to finding further liquors; that Blake was present and claimed the liquors until Forni came and that he then claimed the liquors, and the witness further stated that Forni told him that he had purchased the Scotch whiskey from a boat "lying ouside". The latter testimony was without objection.

It thus results that it appears from a close con-

sideration of the record that the defendant was not denied anything that he asked that could have influenced the verdict. He merely asked that the liquors be excluded from the evidence and they were not in fact put in evidence. He did not object to the testimony of Rinckel in his description of the surroundings, or of the premises, or as to the liquors until practically the whole case was proven by the government. The case thus follows within the principle that a trial court should not be reversed as for error in rulings that it did not make.

The necessity of specific objections at the time the evidence was received is made more manifest when we consider that as to much of the testimony of Rinckel, such as that of the statements of Forni, statements of what Rinckel observed from the adjoining lot, or what he saw through the open door of the garage would not be a disclosure of any knowledge that he obtained when making the search. Accordingly, the objection should have been specifically made.

(2) THE TESTIMONY WAS IN FACT COMPETENT.

But a further consideration of the testimony will show that the defendant did not establish the *incompetency* of the evidence as to his possession of the liquors even if he had properly and seasonably objected. On this issue it is proper to consider all the preliminary facts, as well as everything else shown to the court up to the time of the receipt of the evi-

dence. We are thus entitled to consider the affidavit of Rinckel produced at the hearing of the preliminary motions, his affidavit filed for the purpose of obtaining the search warrant and his preliminary testimony at the trial on the issue, as well as any showing made by defendant and from such a showing it appears that

a) the liquors were properly seized upon a search warrant,

b) they were properly seized as an incident to the lawful arrest of the defendant Blake at least, even if the search warrant had not been validly obtained.

## *(a) THE SEARCH WARRANT OBTAINED BY AGENT RINCKEL WAS NOT INVALID.*

The witness Rinckel, as a portion of his testimony, stated that on account of information from neighbors he was led to watch the garage and seeing a truck come from it, which, upon being searched, disclosed nothing, he went up to the premises and, looking *through an open door,* saw cases of Scotch whiskey marked as coming from abroad and without any evidence on the packages of a tax being paid. He immediately departed and the same day obtained the search warrant in question. It is true he did not put in the affidavit for a search warrant all the facts he saw and could have put in the affidavit. But, on the other hand, the affidavit is not subject to the infirmity sometimes found, to wit, that it con-

tained no more than the statement of the agent that he "had reason to believe and did believe", etc. For the affidavit for search warrant did state one definite incriminatory fact, to wit, that on the same day the agent visited the premises and saw a quantity of liquors without evidence of tax being paid. The further statement that affiant had been informed that liquors are taken to and from the garage night and day, while standing alone might not have been sufficient, yet being coupled with the statement that affiant visited the premises and saw a quantity of liquors, it would not be without significance. It thus appears that the United States Commissioner had before him an affidavit of a definite fact tending to show probable cause for the issuance of the warrant. The property was sufficiently described as a basement garage at No. 2933 Webster Street, San Francisco, and an outhouse or shed on the same lot in the rear, being the premises of parties unknown.

*Tynan vs. U. S.*, 197 Fed. 177, 179.

Since the affidavit in question contains a definite incriminatory fact tending to show probable cause it may not be said to be subject to the infirmities of the affidavits under consideration in the cases cited by counsel.

Since in the fourth amendment to the constitution, a search or seizure of property is referred to in the same terms as a seizure of person, it follows that decisions relating to probable cause upon which to base a warrant of arrest will be of service in deter-

mining what is probable cause upon the issuance of a search warrant. The following cases are pertinent:

*U. S. vs. Burr,* 24 Fed. Cas. No. 14692a.

In that case Chief Justice Marshall having occasion to state the rule said:

> "On an application of this kind I certainly should not require that proof which would be necessary to convict the person to be committed on a trial in chief; nor should I even require that which would absolutely convince my own mind of the guilt of the accused; but I ought to require and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reasons to believe that the crime alleged has been committed by the persons charged with having committed it."

In

*Munns v. Dupont,* Fed. Cas. No. 9926, 3 Washington C. C. 31,

it was said:

> "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

Other cases holding that the words "probable cause" used as a measure of proof required in proceedings do not import that the evidence should be

sufficient to justify conviction at trial, are the following:

*Bingham v. Bradley,* 241 U. S. 511;
*Bryant v. U. S.,* 167 U. S. 104;
*Sternaman v. Peck,* 80 Fed. 883.

*The garage was not occupied as a private dwelling.*

It is further contended that the premises in question were a "private dwelling" and that a warrant could not be issued to search it unless there was evidence of a sale of liquor. If the initial showing before the Commissioner had disclosed that the premises were a "private dwelling", it may be true that the affidavit should then go further and show that the case was within one of the exceptions set forth in Section 25 of Title II of the National Prohibition Act. But since it does not appear from the affidavit that the premises were a private dwelling and since there is nothing in the general search warrant act contained in Title XI of the Espionage Act, which required a showing upon that point, we think it must be entirely clear that the proceedings are sustainable unless controverted under the provisions of section 15 of the Search Warrant Act, (40 Stat. 229, Barnes Fed. Code, sec. 10061). If so controverted the issue can then be tried as to whether the building be a private dwelling or whether it be within one of the exceptions set forth in Section 25. The subsequent preliminary motions adverted to may constitute such a proceeding. If that be true, the showing of the government upon the point in question

was sufficient to sustain the warrant. For the court was not obliged to accept the evidence of defendant Forni, certainly not where controverted, and as clearly not where the court, from the surroundings, may consider it as palpably untrue. While Forni did testify that the premises were used solely as his private dwelling, and that the premises were not used for the sale of liquor, and that the garage was a part of the dwelling, on the other hand Rinckel testified that the garage was disconnected from any other portion of the building in that there is no ingress or egress therefrom to any other portion of the building and that the main entrance into the said garage is on and from said Webster Street (Tr. p. 57), and again that affiant did not, nor did any of the other Prohibition Agents present, at any time enter the dwelling of said defendant, and that while affiant saw liquor in the residence of the defendant he did not, nor did any other agents search for, seize, or attempt to seize any liquor in the residence of the defendant.

*There was evidence for the court to find a sale of liquor in fact.*

Moreover, if the garage were held to be a portion of the private dwelling of the defendant the case was shown to be in at least one, if not two, of the exceptions stated in Section 25. It must not be overlooked that the unusually large amount of liquors stored on the premises is to be accorded great significance in determining the issue, as well as state-

ments made by Forni in regard to the liquors. The court could thus have found that he had in his possession the large quantity of liquor described, bearing marks showing that it had been imported and without marks showing that it had passed through the customs, or had paid any tax. There was further the express admission of Forni that he had purchased it "over the rail outside", thus expressly admitting that it was contraband; there appeared the further significant fact that as to fifteen of the barrels they had been emptied. The court was thus authorized to infer that in fact a sale had been made of liquors from the premises. The statute itself, Section 33 of Title II of the National Prohibition Act, provides that *possession* of such liquors, under the circumstances here shown is prima facie evidence that the liquors are kept *for the purpose of being sold.* It is therefore manifest that in consideration of this presumption, of the circumstances of the unlawful importation, and of the fact that fifteen of the barrels were empty, would authorize the court to infer that there had been *in fact* a sale.

*The court could have found that the garage was used for a business purpose—a store.*

Moreover, the trial court would have been compelled to find that the premises were used for a business purpose "such as a *store*". It is indeed not without great significance that defendant Forni, in describing the surroundings, was compelled to make use of the very word *store* in his affidavit, for he

deposes in his affidavit (Tr. p. 55) that the said basement and shed were used by affiant and his brother "for the purpose of therein *storing* in addition to said *property seized* as aforesaid, (the said liquors) personal effects, etc". And counsel at the trial in framing his questions, and no doubt familiar with the case in hand, was constrained perforce to drop into the same phraseology when he asked one of his own witnesses (Tr. p. 71) "do you know what was *stored* in the basement in *addition* to *this liquor* taken from there?" Again considering the wholesale store of liquors under the circumstances adverted to, it is clear that the court had the discretion to find that the basement in question, if not used for the actual sale of liquor was used for a business purpose, to wit, a store for liquor.

### *(b) THE SEIZURE OF THE LIQUORS IN QUESTION WAS PROPERLY MADE AS AN INCIDENT TO A LAWFUL ARREST.*

If it should turn out that the search warrant in the possession of Agent Rinckel was not validly issued, it would still have been legal and proper for him to seize the liquors as an incident to a lawful arrest.

*Vachina vs. U. S.,* 283 Fed. 35.

Prior to obtaining or using any search warrant Prohibition Agent Rinckel, looking through an open door, saw in plain sight in the garage 25 cases of intoxicating liquor, to wit, Scotch whiskey. The cases were marked "D. T. Co., Vancouver, B. C.," was

untax paid, and contained no revenue stamps whatever. Rinckel so deposes in his affidavit (Tr. p. 58). As to the liquor in the back sheds, Rinckel deposes (Tr. p. 67) that they first observed that from another lot. Thus, the officer had personal knowledge from his senses that a considerable quantity of intoxicating liquor, to wit, Scotch whiskey, which bore indications of being illicit and contraband, were stored in the garage and manifestly unlawfully possessed by some person. A short time later in the same day the same officer seized the liquor and arrested Blake, who was present and claimed to own the liquor. (Tr. p. 60.) There was thus a misdemeanor being committed in the presence of the officers, whereupon they immediately arrested the person apparently committing the crime, who claimed to own the liquor, and seized the liquors as an incident to such arrest. The authorities are uniform that in such case a warrant was not required.

We cite the following cases holding and applying the principle.

This Court in the case of

*Vachina vs. U. S.,* 283 Fed. 35, 36,

said:

> "The Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures, is to be construed in conformity with the principles of the common law. At common law officers may arrest those who commit crimes in

their presence, and they may avert a crime in the process of commission in their presence, by arrest, and without a search warrant they may seize the instrument of the crime. Bishop, New Crim. Proc. Sec. 183; Byrne, Federal Crim. Proc. Sec. 10. The question which is here presented was before this court in *Kathriner v. United States,* 276 Fed. 808, which we held under circumstances almost identical with those here disclosed, that liquor may be seized without a search warrant. Other similar rulings are found in *United States v. Borkowski* (D. C.), 268 Fed. 408; *United States v. Camarota* (D. C.), 278 Fed. 388; *In re Mobile* (D. C.), 278 Fed. 949; *United States v. Snyder* (D. C.), 278 Fed. 650."

Thus in

*Lambert v. U. S.,* 282 Fed. 413, 417,

it was said by this Court:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means

> of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

Another instructive case on the point of a seizure of articles as incident to a lawful arrest was the case of

*Agnello vs. U. S.,* 290 Fed. 671, 679.

In that case the Circuit of Appeals for the Second Circuit, on a review of the authorities, upholds the right of search and seizure in such case. There was an arrest of certain parties for a violation of the Narcotic Laws and besides the search of the person the officers went some distance away and searched the lodgings of one of them.

In the case of

*Dillon vs. U. S.,* 279 Fed. 639, 647,

the Circuit Court of Appeals of the Second Circuit applied the same principle and quoted with approval from the case, *ex parte*

*Morrill,* 35 Fed. 261, 267,

as follows:

> "In other words, a crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause, too, to believe, or seasonable

> ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime."

And referring to a case previously decided in the same court said:

> "And in *Wiggins v. United States,* 272 Fed. 41, 45, we stated our belief that, where liquors were being sold in violation of law, the officers, who witness the commission of the offense, have as much right to seize the liquors without a search warrant as they have to apprehend the wrongdoer without a warrant of arrest. We see no violation of any constitutional right of the defendant in taking possession of the liquors, which the defendant had in his unlawful possession and of which an unlawful use was being made in the presence of the officers."

In the case of

*McBride vs. U. S.,* 284 Fed. 416, 419,

the Circuit Court of Appeals of the Fifth Circuit applied the same principle and said:

> At common law it was always lawful to arrest a person without warrant, where a crime was being committed in the presence of an officer and to enter a building without warrant, in which such crime was being perpetrated.
>
> *Wharton, Criminal Procedure* (10th Ed.), Secs. 34, 51; *Delafoile v. New Jersey,* 54 N. J. Law, 381 24 Atl. 557, 16 L. R. A. 500, 502; *In re Acker* (C. C.) 66 Fed. 290, 293.

"Where an officer is being apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant. *Piedmont Hotel v. Henderson,* 9 Ga. App. 672, 681, 72, S. E. 51; *Earl v. State,* 124, Ga. 28, 29, 52 S. E. 78; *Brooks v. State,* 114 Ga. 6, 8-39, S. E. 877; *Ramsey vs. State,* 92 Ga. 53, 63, 17 S. E. 613. Therefore we are of the opinion that the entry into this stable under the circumstances of this case was legal, and that the court did not err in admitting the testimony of the officers."

The evidence of the commission of crime in the McBride case was derived principally or wholly through the sense of smell.

The case of

*U. S. vs. Borkowski,* 268 Fed. 408, 412,

was a case of the same character wherein the officers through the sense of smell came to know that a crime was being committed. The District Court in that case said:

"The rule, state and federal, is that officers may arrest those who break the peace or commit crimes in their presence. Bishop's new Crim. Proc., Sec. 183; Byrne, Fed. Crim. Proc., Sec. 10; *Wolf v. State,* 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and restraining the instrument of the crime. See also *Ross v. Lettett,* 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex parte Morrill* (C. C.), 35 Fed. 261;

*Bad Elk v. U. S.,* 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and *Kurtz v. Moffit,* 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Other pertinent cases turning upon the principle that an officer may make an arrest for a crime committed in his presence without a warrant and as incident to such lawful arrest, may make a further search of the person and surroundings of the party arrested, are the following:

*U. S. vs. Daisin,* 288 Fed. 201;

*Kathriner vs. U. S.,* 276 Fed. 808;

*O'Connor vs. U. S.,* 281 Fed. 396;

*Green vs. U. S.,* 289 Fed. 236;

*U. S. ex rel Flynn vs. Fuellhart,* 106 Fed. 911.

There was thus abundant evidence to show that the officers came to know that a crime was being

committed in their presence and the discretion of the court in so deciding will not now be disturbed.

This court in its opinion in

*Winkler vs. U. S.,* 297 Fed. 202, 203,

cited with approval certain language from the case of

*Snyder vs. U. S.,* 285 Fed. 1,

to wit:

> "Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge and his finding should not be disturbed on appeal unless it is without support in the evidence."

In the instant case the court sustained the view that the officers had probable cause for knowing that a crime was being committed.

The decision of this court in the case of

*Temperani vs. U. S.,* 299 Fed. 365,

is cited as an authority against the position of the government here taken. In fact no other arguments are urged as against the government's contention that the liquor here could have been seized as incident to a lawful arrest. But the distinction between the facts of the Temperani case and the facts of the case at bar is clear.

Thus in the Temperani case (p. 367) it was stated that the government did not claim the right to search a private dwelling or garage "under the facts

disclosed by this record, but an attempt is made to justify the conduct of the officers under the common law or statutory rule permitting peace officers to make arrests for offenses committed within their presence". It thus appears that the court did not intend to dispute such a rule, but it was said the case was not within the rule, for the opinion continued, "But there the offender was not in the presence of the officers; he was not in the garage and they had no reason to suspect that he was there. Laying all pretense aside the officers entered the garage not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury". It is further stated in the opinion that at the time of the entry in the Temperani case there was no person in the garage and the plaintiff in error was absent from home. On the other hand, in the instant case the officers at the time they seized the liquors arrested Blake, who claimed to own the liquors. (Tr. p. 60.) It therefore appears that in the instant case there was at the time of the seizure a lawful arrest of defendant Blake for the crime of the unlawful possession of the intoxicating liquors. The circumstance that Forni was not arrested until some minutes later does not alter the case.

There can be noted the further distinction between the Temperani case and the case at bar in this, that the court in the instant case had sufficient facts before it to conclude that the garage in question was

not a part of the dwelling, but that the contention in that behalf was a mere subterfuge.

The Temperani case is also cited by counsel in their discussion of the question of search warrant in the case at bar. But it can have no relevancy on that point for the reason that in the Temperani case there was no search warrant.

## (3) THE LIQUORS WERE PROPERLY RETAINED AND RECEIVED IN EVIDENCE ON ACCOUNT OF BLAKE BEING ALSO INFORMED AGAINST.

Moreover, it is clear that in any event it was proper to retain the liquors as against the defendant Blake and thus deny Forni's motion. And it was proper to receive the liquors in evidence at the trial, the defendant Blake being also on trial. For as we have seen, Blake was arrested at the time of the seizure; he was jointly charged with Forni in the same information and, having been arraigned, pleaded not guilty and was placed on trial at the same time with Forni and convicted of the same offense. Being charged with a misdemeanor, such course was allowable.

California Penal Code, Section 1043.

16 Corpus Juris 817, Criminal Law Section 2071, note 73 and cases cited.

It is not contended that any of the rights of Blake under the Fourth Amendment were invaded. He could not have availed himself of any invasion, if

any invasion there were, of the rights of defendant Forni under the Amendments in question.

*Remus vs. U. S.,* 291 Fed. 501, 511;
*Hale vs. Henkel,* 201 U. S. 43, 50 L. Ed. 652;
*Heywood vs. U. S.,* 268 Fed. 795, 803.

It thus results that regardless of any objection Forni might have had to the evidence it was proper for the court to retain the liquors and receive them in evidence as incriminating Blake, and the circumstance that they might have been inadmissible as to Forni, even if that were true, would not prevent their use in evidence.

*Pappas vs. U. S.,* 292 Fed. 982;
*Itow vs. U. S.,* 223 Fed. 25, 29.

It is held specifically in these cases, as well as other cases that might be cited, that the remedy of a defendant in such a situation as Forni claimed to be is not to require the evidence to be excluded, but to obtain an instruction from the court limiting its use. No such instruction was asked by Forni or refused. The cases cited are authority that in that case the point is not now available to the defendant Forni.

It is well settled that where evidence is admissible or admitted for a limited purpose, it is not error for the court to fail to so instruct in the absence of a request therefor.

*Ball vs. U. S.,* 147 Fed. 32, 41.

## II

## THE COURT DID NOT ERR IN REGARD TO THE TESTIMONY OF RINCKEL AS TO THE ARRESTS OF FORNI.

One of the counts of the information upon which the defendants were on trial was for maintaining a common nuisance in that they kept for sale on the premises certain liquors. The case was thus one of the type wherein evidence of other similar offenses would be properly received as bearing on the question of intent.

*Hazelton vs. U. S.*, 293 Fed. 384.

And from the statement made by the trial Judge in ruling it appears that he only had in mind this principle. For he said in ruling "the rule is well settled that where the charge is that of maintaining a nuisance involving the keeping for sale of intoxicating liquor, previous offenses are admissible." (Tr. p. 65.) In face of such a statement of the court, if the real point of the defendants' objection was as to proof of arrest rather than as to proof of a crime, he should have so indicated to the court.

Moreover, the record is not such as to show error. It appears that the witness Rinckel first testified, without any objection whatever, "I have arrested him *several* times". (Tr. p. 65.) The next question was "about how many times, Rinckel?" This was objected to on general grounds and being overruled the witness merely answered he arrested him "*four*

*or five* times". Thus as between the question and answer not objected to and the question and answer objected to the difference is infinitesimal. The subsequent question by the court (Tr. p. 70) was not objected to nor was any exception taken.

On another ground, however, the point would be held to be of no consequence. For it will be seen that the government presented only the single witness, the Agent Rinckel. He was the officer who made the affidavit for the search warrant and who also made the affidavit on behalf of the government in resisting their preliminary motions. He was wholly uncorroborated. Thus the case is within the rule recently announced by this court in the case of

> *Stubbs vs. U. S.,* No. 4236, Opinion filed Oct. 20, 1924.

It is there stated that since there was no corroboration of the testimony of the witness as to similar offenses, if the jury discredited her as to the matter in hand they would naturally discredit her as to the other offenses, and the ruling was therefore without prejudice.

The statement of the witness was of little importance in view of the other evidence in the case. It could in no substantial manner cause him any prejudice. It was probably deemed by the court merely preliminary and was not thereafter pursued. It would not afford ground for a reversal of the case in view of the provisions of Section 269 of the Judicial Code, as amended.

To the suggestion made on behalf of plaintiff in error in the discussion of different questions in the case that Rinckel should not have been allowed to declare the character of the liquor, it is answered that the said liquor was Scotch whiskey and intoxicating, and, if the testimony is to be taken at face value, the fact is manifestly proven, but in the absence of cross-examination, or any showing that he could not have known the fact, the court was authorized to take the testimony at face value.

*Winkler vs. U. S.*, 297 Fed. 202, 204.

Moreover, the Agent Rinckel did qualify on the question by saying that he had been for four years a Prohibition Officer, he is described as a Prohibition Agent, and the court can take notice as to the character of the duties of such an officer. He also said that he could say from his experience as a Prohibition Officer and his experience with intoxicating liquor that all of this liquor contained over one-half of one per cent of alcohol by volume (Tr. p. 69) and that he was familiar with various kinds of intoxicating liquor. (Tr. p. 68.)

## III

## THERE WAS NO ERROR COMMITTED IN EXCLUDING FURTHER EVIDENCE BY THE WITNESS S. FORNI IN REGARD TO THE PREMISES BEING THE HOME OF THE DEFENDANT.

The matter complained of in this respect appears at page 72 of the Transcript. Apparently the court

was making a correct application of the rule that all questions as to the competency of the testimony in regard to the liquors was at that stage of the case closed, and that especially the defendant was not entitled to have the question of competency submitted to a jury. There can be no real contention to the contrary. But on the oral argument it seems to be claimed that the testimony might have been relevant upon the further point as to the intent involved in the first count of the information. In the first place it would have been the duty of counsel to so indicate to the court at the time when it appeared that the court had in mind a different question. But, even as to the latter assumption, defendant's contention is wholly unfounded, for the witness was permitted to say "I absolutely know these premises was his home". (Tr. p. 72.)

## IV

## THE ORAL CHARGE OF THE COURT WAS CORRECT; NO EXCEPTIONS WERE TAKEN THERETO.

The charge of the court given to the jury was entirely correct, although short, but no objections can now be urged to the charge since no exceptions were taken, nor were there any objections indicated. (Tr. p. 74.) It appears that at the conclusion of the charge the court asked, "Are there any objections to the instructions?" None were stated, defendant merely excepting to the refusal to give two instruc-

tions theretofore proposed by him. Objections to the charge given by the court are not now available.

*Allis vs. U. S.*, 155 U. S. 117, 123, 39 L. Ed. 91, 93.

Nor did the court err in refusing to give the two instructions requested by the defendant appearing at page 75 of the Transcript.

In the first, the court was asked to state to the jury that it would be a complete defense to the charge to show that the premises were a private dwelling. In other words, that one may use a private dwelling with impunity for acts which in the case of any other building would render it a common nuisance. There is no such rule of law.

The second instruction undertook to define the term "private dwelling", but such definition would have no relevancy as to any matter before the jury. It would be relevant only in determining the competency of testimony which had theretofore been passed upon by the court and was wholly a question of law.

## V

## IF THERE HAD BEEN ANY ERROR COMMITTED IN THE CASE AS ARGUED BY PLAINTIFF IN ERROR, IN VIEW OF THE TESTIMONY IT WOULD HAVE BEEN WITHOUT PREJUDICE.

Even if the receipt of evidence of what Rinckel found upon the seizure of the liquors were incom-

petent it would still be without prejudice under Section 269 of the Judicial Code, as amended.

It will be noted that in advance of any search warrant or search Rinckel saw the Scotch whiskey through an open door. He also states that he saw the liquors in the shed from an adjoining lot. This testimony would have been indisputably competent and admissible. It was not acquired through any trespass; although if it had been so acquired it would not have been for that reason inadmissible.

*Raine vs. U. S.,* 299 Fed. 407, 410;
*Hester vs. U. S.,* 265 U. S. 57, 68 L. Ed.

But the contention that Rinckel committed a trespass in that respect is unfounded, for he evidently saw the Scotch whiskey through the open door of the garage from the street, and he saw the liquors in the shed from an adjoining lot, which would have been no trespass, at least upon Forni. This testimony was not denied. Rinckel further testified that Forni had admitted to him that he obtained the liquors "over the rail on the outside", thus admitting that they were smuggled. This latter testimony was independent of things found upon the search. If no other facts had been proven the jury could have done nothing else than find a verdict of guilty.

See the following cases construing Section 269 of the Judicial Code, as amended:

*Horning v. District of Columbia,* 254 U. S. 135, 65 L. Ed. 185, 187.

*Winkle vs. U. S.*, 291 Fed. 493, 496.

*Mercantile Trust Company v. Olsan*, 292 Fed. 49, 51.

It thus appears that the defendant Forni was fairly tried; that no prejudicial error was committed by the court; that the testimony was so overwhelming that counsel did not even make a motion for a directed verdict, and that the officers, so far from being shown to have invaded defendant's rights, are to be commended for the breaking up of what was a quite elaborate illicit enterprise.

The sentence and judgment should be affirmed.

Respectfully submitted,

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# No. 4355

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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CHARLES FORNI,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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The brief of the plaintiff in error, hereinafter called the defendant, was served and filed on the 23rd day of October, 1924. The case was argued before this Honorable Court on the 29th day of October, 1924. The brief of the defendant in error, hereinafter called the Government, was served on the 12th day of November, 1924. In view of that fact we feel that a short reply in the absence of the opportunity to comment on the same orally will help to clarify the issues of the case.

A thorough examination of the brief for the Government and the authorities cited will show that the fundamental issues are those raised in the opening brief and that as to them the Government has

no solid answer. Its brief for the most part consists of a statement of alleged technical errors in the record which even if well taken but serve to cloud the issues and prevent the doing of substantial justice and all of which under the provisions of Rule 11 of this court and Section 269 of the Judicial Code, which the Government itself cites, this court may, and in a proper case should, entirely disregard.

An inadvertent error on the part of the Government should first be corrected. The statement is made on page 2 of its brief that the affidavit of the defendant Forni in support of his motion to return personal property was not verified or filed until July, 1923, at which time it is claimed the motion had already been determined. It appears in the record (Tr. page 23) that the order denying the motion to return personal property was not made until the 15th of September, 1923. The affidavit was therefore properly before the court at the time it made its order.

The Government in discussing certain objections not made appears to labor under the belief that although an objection has once been made and overruled and an exception duly noted it is the duty of the party to repeat the same objection to that line of testimony every time it is offered. (Gov't. Brief, pp. 16 and 36.) Such, of course, is not the rule, and once an objection has been properly made and overruled further objections to similar testimony

are not required, but merely serve to delay the trial and enlarge the record. (Paris v. U. S., 260 Fed. 529, 533.)

To our contention that it was prejudicial and reversible error to permit testimony as to prior *arrests* without proof of conviction or guilt, and without indicating the time when the same occurred or the nature of the crime charged the Government in substance makes no attempt to reply save that proof of a prior *offence* would have been admissible and that the jury in this case need not have believed the witness. This, of course, does not meet the objection raised.

So also the Government lays some considerable stress on a purported admission of Forni that the Scotch whiskey seized was procured "over the rail". Looking at the Tr. p. 70, it is clear that there is nothing to connect the liquor seized with the liquor alleged to have been referred to by Forni, nor is there anything in the admission which would justify a jury to find that the liquor was purchased after the prohibition amendment went into effect.

A typical illustration of the technical nature of the Government's attack is its attempt (Brief, p. 23) to magnify the use of the language in Forni's affidavit that the basement and shed were used by him and his brother "for the purpose of therein *storing* in addition to said property seized" certain personal effects, etc., into a logical and legal ground for the court and the jury to conclude that

the basement and shed were used as a *"store"*. We cannot believe that counsel is serious in this specious attempt to confuse the noun, a "store," with the verb "to store." We are constrained to believe that this is an ill timed attempt at levity.

So also the Government takes the position that even conceding the evidence was illegally obtained as respects defendant Forni and that proper steps were taken to exclude its use from the trial, nevertheless in view of the fact that there was another defendant, Blake, as to whom the evidence might have been admissible, the defendant Forni cannot complain in the absence of a request for an instruction that the evidence be considered by the jury as applicable only to defendant Blake. In support of this very technical objection there is cited *Pappas v. U. S.,* 292 Fed. 982, which merely holds that where two defendants are jointly tried each one has the privilege of introducing all relevant and competent evidence to establish his own innocence regardless of its effect on the co-defendant. Moreover, the same evidence was actually given on the trial of the defendant without objection and hence the admission of antecedent statements of the same witness was held harmless. In *Itow v. U. S.,* 223 Fed. 25, the evidence consisted of statements and admissions subsequent to arrest and prior to the trial not binding on the other defendant and in the nature of self-serving declarations, and when offered was expressly stated to be limited in its appli-

cation to one defendant. Looking at the matter more closely, however, it is at once apparent that there is no analogy between these cases and the rule they enunciate and the rule contended for by the Government. For the court there applied mere rules of evidence. There is no fundamental reason why admissions, hearsay testimony and other similar weaker forms of evidence should not be admitted subject to instruction as to its inherent unreliability and subject to the usual privilege of the jury to attribute to it such weight as they find it deserves. There is no sound public policy involved and in fact it is clearly within the power of Congress by appropriate legislation to permit such testimony or to reject it as it may be advised.

Our case is wholly otherwise. Not an act of Congress but the Fourth and Fifth Amendments to the Constitution protect every person against unreasonable search and seizure and forbid that any person shall be compelled in any criminal case to be a witness against himself. This is not a mere rule of evidence but a constitutional inhibition declaring fundamental rights and which cannot be evaded by such a simple expedient as accusing a second or third party, having a joint trial and bringing in the evidence under that pretense to convict the person from whom it was illegally attained. It will be noted that in this case not Blake, but the defendant Forni, the owner of the property seized, the occupier of the home invaded, was the person who made timely and proper objection to the unlawful search,

who made proper motions for the return and exclusion from evidence of the property seized and who was actually convicted on the strength of the very evidence illegally seized.

So likewise is the ingenious contention of the Government that the motion to exclude from evidence referred only to the personal property seized and did not expressly purport to cover all evidence and information unlawfully obtained. The direct answer to this is again that the Government would destroy substantial rights by a technical and hair-splitting distinction in a case where broad principles must be applied. It would be a simple matter for the Government in every instance of unlawful search and seizure merely to testify as to what was seized without actually producing the physical evidence. This is a mere method of accomplishing indirectly what cannot be done directly. The exclusion of physical property unlawfully seized necessarily implies and requires that all evidence of the same secured through the seizure and all description of the property so seized must likewise be barred, and such an obvious rule has in fact been declared by the courts.

*Legman v. U. S.*, 295 Fed. 474 (C. C. A. 3rd);
*U. S. v. Jajeiswiec*, 285 Fed. 789.

Furthermore if the same were necessary the record shows (Tr. pp. 67, 68) that counsel for the defendant objected to a description of the property seized

> "as incompetent, irrelevant and immaterial and violative of the rights of the defendant on the ground that the information was unlawfully obtained and illegally obtained" and "it was obtained in violation of the rights of the defendant under Section 25 of the so-called Prohibition Act."

This objection clearly is directed to information as distinguished from personal property illegally acquired. In fact the same court was fully cognizant of all the circumstances of the search and seizure by virtue of the fact that it had the same morning denied the motion to exclude the personal property seized from evidence. Even if there had been no antecedent motion for the return of property and its exclusion from evidence, under the liberal rule laid down in the cases of *Gouled v. United States,* and *Amos v. United States,* cited in our opening brief, if it becomes apparent to a court during the progress of a trial that evidence was illegally obtained and no collateral investigation in that respect is required, then it is the right of the defendant and the duty of the court to eliminate such illegal evidence. Surely the meagre testimony in this case as set forth in the Government's own brief (pp. 7 to 10) clearly shows that the premises invaded constituted a home, and that preliminary evidence was procured only by climbing a fence and trespassing upon yard of the defendant.

The Government retreats to still another position during the course of its brief. It is said that even

conceding all of our contentions, nevertheless, there still was sufficient evidence to support the verdict. It is true that the sufficiency of the evidence is not the subject of any definite exception. Nevertheless, we feel free to discuss the same because the Government contends that as a matter of justice, quoting Section 269 of the Judicial Code above referred to, no prejudicial error actually occurred. It is to be borne in mind that the Government inadvertently combines the affidavit in support of the search warrant, the affidavit in opposition to the return of personal property and the testimony at the trial in one mass and fails to limit each to the only use to which it may properly be put. The actual testimony in full is set forth in the Government's brief, pp. 7-10. Omitting the testimony as respects the liquor seized the only evidence is that of the witness Rinckel who states

> "we first observed that from another lot the liquor in the back shed and climbed into the yard and saw into the basement and saw the liquor piled up there and went to the United States Commissioner and got a search warrant and went back and seized the liquor."

The discussion in the Government's brief (p. 18 subsequent) as to what was seen by the agent through the "open door" has no reference to any evidence adduced at the trial. The only evidence aside from the description of the liquor seized is that set out above. If it is the Government's contention that that of itself supports the verdict we

are willing to submit the matter without further discussion.

In the last analysis the Government has conceded our basic claims. The question here is whether a certain search and seizure were legal and whether the evidence secured therein can be used at the trial. The true procedure in such case to be followed was set forth in masterly style by the late Judge Dooling in *United States v. Mitchel,* 274 Fed. 124:

> "If in the attempted enforcement of the prohibition law a search warrant is applied for the first inquiry of the Judge or Commissioner should be as to the character of the place to be searched. If it be a private dwelling then the inquiry should be what evidence have you that this place is being used for the unlawful sale of intoxicating liquor."

The affidavits of defendant Forni, the evidence of witness Enrico Besozzi (Tr. p. 70) and the evidence of the Government witness himself (Tr. p. 69) all conclusively establish that the defendant Forni's premises constituted his private dwelling. The mere incidental circumstance that the garage in question, like most garages, opened on to the street and had no direct interior passageway with the upper stories of the building does not and should not remove it from the protection intended to be afforded to it. The same is true of the shed within the common enclosure.

To the cases cited in our opening brief we desire merely to add *Cornelli v. Moore,* 66 L. Ed. 332 (257

U. S. 491), where in a case involving the right of an individual to compel the collector of internal revenue to permit the transportation of liquor from certain bonded warehouses to his private home the Supreme Court of the United States declared:

> "We are unable to see in Sec. 33 (of the National Prohibition Act) which takes illegality from the 'liquors in one's private dwelling while the same is occupied and used by him as his dwelling only' and the rights that may attach to liquors in such situation and intention to extend such rights to liquors not so situated; or to put it more pointedly an intention to make all bonded warehouses of the country *outbuildings* of its dwellings." (Our italics.)

While perhaps not a direct holding, the clear implication of this quotation and the undoubted view of the Supreme Court of the United States is that whatever would technically constitute an outbuilding at common law is within the protection and the immunity from search except on proof of sale of liquor which is accorded to a "private dwelling" by the Prohibition Act.

It follows that unless there was a sufficient affidavit charging *a sale* of liquor on the premises, the warrant was illegal.

Since the argument of this case this court in the case of *Lochnane v. United States,* handed down its opinion on the 10th of November of this year, which fully substantiates the views set forth in our brief as to the insufficiency of the instant affidavit to support a search warrant. We will not repeat the

arguments there made, but merely desire to call to this court's attention that if the affidavit by Agent Rinckel is held to contain a statement that he knew that a sale of liquor had ever been made on the premises (and the affidavit must contain such facts if the warrant and search are to be upheld), then Agent Rinckel is guilty of perjury because in his testimony (Tr. p. 69) he says "I saw no liquor being sold there." Of course, the answer is that the affidavit does not charge that a sale was made but merely contains general conclusions that from information the affiant believes a sale was made.

As a last refuge the Government makes the claim that no warrant was necessary under the circumstances of the case and that the arrest and search and seizure could have proceeded without the issuance of any warrant.

The fundamental fallacy involved here is that there was no evidence whatsoever that any crime was ever committed and certainly no crime was committed in the presence of the arresting officers. The Government loses sight of the fact that it is not illegal to possess liquor in one's private home, although in fact the affidavit of Rinckel states and the Government repeats in its brief (p. 22):

> "Affiant did not nor did any of the other prohibition agents present at any time enter the dwelling of said defendant and while affiant saw liquor in the residence of the defendant he did not nor did any other agents search for, seize or attempt to seize any liquor in the residence of the defendant."

This statement is unintelligible unless it means that the agents, although they actually saw liquor in the residence, had no right to search the same and make arrests for its possession. If our contention is correct that the basement (garage) and the shed in the rear were part of the "private dwelling", then the same reason and the same rule which prevented the agents from entering, what they, laymen, called a residence, although liquor was there in plain sight, must unnecessarily prevent them from entering the basement or shed, although liquor was likewise there in plain sight. Once we find that there is no allegation or evidence of a sale, but mere possession in a private dwelling not used for business purposes then there is no crime in the presence of an officer which would permit an arrest without a warrant.

If the contention of the Government is correct, then every private home in which there is any liquor, to the knowledge of the prohibition agent—whether he has seen it as a guest, or whether the owner has told him of its existence therein, or whether he has merely seen it through a window or an open door himself—may be searched and owners arrested without a warrant. The same crime of possession in the presence of an officer would then be committed which the Government claims occurred in the instant case. Such, of course, is a clear perversion of the language and the intention of the Prohibition Act. It was never intended that for a

"crime" committed in his presence, an officer could secure no warrant authorizing an arrest, but could in fact make the arrest without the warrant. When the Government in its brief cites not only with acquiescence but with apparent pride that the agents here actually saw liquor in the residence of the defendant but did not search for, seize or attempt to seize any of the same, then they admit the principle we contend for, namely, that the residence and all of the residence is immune from search and seizure in such a case, with or without a warrant, except on proof of *sale*.

Finally, we desire to invoke Section 269 of the Judicial Code and Rule XI of this court to the end that no mere technical defect or imperfection in the record should militate against a fair and complete review of this case. This honorable court, particularly at this time, should take a firm stand in defence of fundamental constitutional guarantees. It is of more importance that excessive and misguided zeal on the part of the Government agents which endanger the security of all should be promptly and firmly checked than that any one individual should be convicted at the cost of an invasion of his rights and the consequent loss of general public security.

We again desire to call to this court's attention the fact that pending this appeal the plaintiff in error is confined in jail undergoing and suffering

the sentence imposed upon him and therefore request a speedy determination of this case.

Dated, San Francisco,
November 20, 1924.

Respectfully submitted,
H. S. Young,
R. G. Hudson,
Frank T. O'Neill,
Preston & Duncan,
*Attorneys for Plaintiff in Error.*

B. F. Rabinowitz,
*Of Counsel.*

No. 4355

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

---

CHARLES FORNI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

---

# PETITION FOR REHEARING

---

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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CHARLES FORNI,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Denfendant in Error.*

No. 4355

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## PETITION FOR REHEARING

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To the Honorable, The Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

This is a petition for rehearing on behalf of plaintiff in error, Charles Forni, after decision of this court, by a divided opinion, affirming the judgment of the District Court convicting plaintiff in error on the two counts of unlawful possession of intoxicating liquor and maintaining a common nuisance by keeping the same liquor for sale.

Two major grounds of error were advanced in the Briefs and in the argument as requiring a reversal of

the judgment. Our position was that the only evidence at the trial in support of either count was evidence describing liquor seized under a search warrant theretofore issued. The liquor seized was found in a private garage underneath the private dwelling of plaintiff in error and in a shed in the rear of his house, all of the same being surrounded by a common enclosure and actually and in good faith having been at the time and for several years prior thereto his residence. We maintained that the garage and shed under the facts disclosed constituted a part of the dwelling which under Sec. 25 of Title 2 of the National Prohibition Act were immune from search except under a search warrant issued upon an affidavit charging and supported by facts reasonably warranting the belief that the premises were being used for the purpose of an unlawful sale of liquor therein. The whole argument below and heretofore in this court turned on the two questions whether the shed and garage were within the immunity from search accorded to a "dwelling house" and whether the affidavit contained facts alleging and reasonably substantiating the charge of *sale* therein.

In our Brief (pp. 15 to 19) we set out the authorities supporting the view that the shed and garage constituted a part of the private dwelling; which authorities were not questioned by the Government in its reply.

That there was in fact no sale on the premises is directly sworn to by plaintiff in error in his affidavit in

support of the petition for a return of personal property

> "That said premises were never used in whole or in part for any business purpose and that no sale of intoxicating liquors was ever made therein." (Tr. p. 27, 28.)

and the only witness for the Government at the trial testified

> "This is a dwelling house with a garage underneath and with outhouses, which were all enclosed with a fence . . . I saw no liquor being sold there." (Tr. p. 69.)

As respects the question of sale we likewise set out, in full, numerous cases, all in terms holding that the affidavit, to be sufficient, must contain not hearsay, surmises or conclusions of the affiant, but definite facts on the basis of which the commissioner issuing the warrant might reasonably determine that a violation of the law was being committed, which violation, where the search warrant was for the purpose of entering a private dwelling, must be a *sale* of liquor. The pertinent part of the affidavit under attack is

> "That affiant has been informed that liquors are taken to and from said garage both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½% alcohol illegally acquired are stored and traded in from this garage." (Tr. p. 50.)

As to that part of this affidavit based on information and belief, no question of its insufficiency to justify a search can be made, and this court in its opinion so declares. That from inspection, the presence of liquor could be determined we may concede for the moment, waiving the impossibility of determining from mere distant inspection the intoxicating nature of liquor. But we earnestly urge that the averment

> "that affiant had reason to believe . . . from inspection of said garage that liquors in excess of ½% alcohol illegally acquired are . . . traded in from this garage."

does not contain a single *fact* sufficient to constitute the proof of a *sale* which under the law is prerequisite. No substantial answer was made to this claim by the Government, either in its Brief or in the argument.

However, this court, in its opinion, apparently did not find it necessary to determine whether the shed and garage were a part of the dwelling house or whether there was a proof of sale because it considered that the *storage* of the liquor seized, in and of itself, was a use of a private dwelling for a business purpose which under the same Sec. 25 of Title 2 of the National Prohibition Act removed it from the protection which we claim.

The whole claim of the Government at the trial and in the affidavits previously filed, was that the *private dwelling* of plaintiff in error had never been entered or searched. It was never seriously argued, nor in the passing comment in the Government's Brief is

there cited a single case in support of the theory adopted by this court as determinative of the case. In holding that the mere possession of illicit liquor in a private dwelling, *bona fide* occupied as such, constitutes a "business use" as contemplated by Sec. 25 of the National Prohibition Act we respectfully submit that this court has misconstructed and nullified its meaning and purpose.

The language of the Act in question is as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house." (Sec. 25, Title 2, N. P. A.)

That the premises were a dwelling house was demonstrated both by the affidavit of plaintiff in error and the testimony of the Government witness himself, as hereinabove set forth. The requirement that the private dwelling must be "occupied as such" was intended to cover the situation where an individual, for the sole purpose of evading the law, occupied or slept in business premises with the purpose of thereafter in bad faith claiming that they constituted his private dwelling. The facts of the instant case, as disclosed by undisputed evidence (Tr. p. 70), are that plaintiff in error, his sister and brother occupied the premises in good faith as a private dwelling for years prior to the search in question and that it was their actual and

only place of abode. Hence there can be no question that the premises searched constituted the private dwelling occupied as such.

That it was not used for the unlawful *sale* of intoxicating liquor appears from the evidence and likewise the affidavit wholly fails to charge a sale or to contain the necessary facts to support such a charge. Was it

> "in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house"?

We respectfully submit that the only situation contemplated by this provision is one wherein the proximity of the place of business to the residence or the use of the residence for the business purposes specified in the Act is such that the invitation to the public to transact business would be a mere pretext or blind to cover illegal traffic in liquor. The business itself contemplated by the Act is one which, nominally at least, would be legal, and for the purpose of transacting which the public could freely and openly come and go. It was never intended that the business itself would be *the* illegal acts proscribed by the Prohibition Act. While it is not necessary to contend that in any event it is only *the* businesses listed in the statute, and none other, which will deprive a dwelling of its protection, (as the cases in fact do hold), nevertheless each of the business purposes listed in the statute has in common the dominant characteristic that it is a place open to

the public, and is, nominally, a legitimate and legal pursuit.

If Congress intended the mere possession of liquor in a private dwelling (and, after all, calling the "possession" of liquor "storage" of liquor, does not change the actual situation) to constitute a *business* use, there would have been no point in its language forbidding the search of a private dwelling except on proof of a sale. If the reasoning of this court is sound that because the mere possession of liquor raises the presumption of its possession for the purpose of unlawful sale, etc., and that is a *business* use, then an affidavit charging the possession of any liquor in any private dwelling would be *prima facie* sufficient to support the issuance of a warrant, and a search and seizure. There is no escape from this conclusion. Nowhere in the Act or in the decisions is any weight ascribed to, or any limitation imposed upon, the quantity of liquor which may be possessed in a private dwelling, or to the presence or absence of revenue stamps. To hold that the mere proof of possession in a private dwelling *prima facie* raises the presumption of illegal possession for the purpose of sales and that the same thereby constitutes a business purpose, justifying a search and seizure, renders practically meaningless the statutory protection intended to surround a private dwelling from search except on proof of a *sale*.

The question whether mere possession of liquor in a private home may, by being termed "storage," consti-

tute it a business use of the premises, does not seem to have been directly considered by the courts. The Federal Courts, however, have very definitely held that although a home is being used for the purpose of illicit manufacturing of liquor for commercial purposes, nevertheless the premises cannot be searched because under the Act it is only where a private dwelling is used for unlawful sale or for one of the business purposes specified that a search warrant may issue.

We desire to call this court's attention without further argument to the following Federal cases not heretofore cited in this connection and which have in terms considered this question. The brief excerpts set forth below will indicate the facts of the cases as well as the holding of the court.

*U. S.* vs. *Kelih,* 272 Fed., 484, (D. C., Ill.).

"The defendant in this case has resided in the premises in question for some time. There was nothing in the evidence to show that the premises were used as anything other than a private dwelling. In fact, the court finds that the premises in question were the private dwelling of the defendant and his family. It is not claimed that defendant's private dwelling was being used for the illegal sale of intoxicating liquor. Nor is it claimed that it was being used in part for any business purpose such as a store, shop, saloon, restaurant, hotel or boarding house. However, the contention is made that, because the evidence procured upon the unlawful search discloses a home-made still in operation, the premises ceased to be a private dwelling and became a distillery. It would be equally as sound to contend that if defendant had had a sau-

sage mill in his kitchen, which his wife used occasionally, that would change the character of the dwelling to that of a packing house. If Sec. 25 *supra,* had used the words 'Unless it is being used for the unlawful SALE OR MANUFACTURE of intoxicating liquor' a different situation would arise; but the statute does not use the capitalized words and limits the business purpose to such use as a 'store, shop, saloon, restaurant, hotel, or boarding house.' And there is now and was then no evidence to support the contention that the premises were used in part for any of the specific excepted purposes set out in the statute."

On a parity of reasoning we urge that the statute does not declare that an unlawful sale *or possession* in a private dwelling will authorize its invasion.

So in *Armstrong* vs. *U. S.* 275 Fed. 506, the court says:

"The Congress left no doubt in the mind of one reading the Act that, when a search warrant was applied for to search a private dwelling, something more must be stated than for a store or other place of business. A man's private dwelling, being his castle, should not be invaded, except and unless it was being used for the unlawful sale of intoxicating liquor, or unless it was being partly used for one or more of the businesses mentioned in the quotation above; and these facts must appear in the affidavit, or such facts be contained therein as will raise in the mind of the officer issuing the warrant a reasonable ground to believe such fact exists . . . ."

So also in *U. S.* vs. *Jajewswiec,* 285 Fed. 789, (D. C. Mass.), it is said:

> "It is contended by the Government that the warrant could lawfully issue, if the facts supported by oath justified the magistrate issuing the warrant in concluding that there was probable cause to believe that the dwelling was in part used for the business of *manufacturing liquor.* To adopt this contention is to extend by implication the right to search dwellings beyond the express limitation of the Act.
>
> (Here follows the quotation from *U. S.* vs. *Kelih* hereinabove set forth.)
>
> The construction of the court in this case would seem to be the proper construction to be placed upon the provision of the Act. If Congress had intended to extend the right to search dwelling houses used in part for any business, or even for the unlawful business of manufacturing intoxicating liquors, it could have easily so provided . . . .
>
> As the affidavit and warrant failed to disclose any evidence tending to show that the defendant's dwelling house was being used for the unlawful sale of intoxicating liquor, or was used in part as a store, shop, saloon, restaurant, hotel or boarding house, the court is of the opinion that the search warrant was void and the search made upon it illegal and unlawful."

The Circuit Court of Appeals for the Seventh Circuit specifically considered this question in the case of *Joswich* vs. *U. S.,* 288 Fed. 831, where the affidavit charged that illicit liquor was being manufactured on the premises and in a house located on the rear part of

the lot at ————, being the premises of Joe Joswich, the court saying:

> "The manufacture of illicit liquor in a house does not bring the case within the language of the statute . . .
>
> It is apparent from a reading of this section (Sec. 25) that the Congress had in mind the distinction which has always existed (so far as search is concerned) between a dwelling house and a place of business. Since the time of Otis, back in Colonial days, the dwelling house, occupied as such, has been recognized as the owner's 'castle' and has not been the legitimate object of raids by Government officials, unless the showing made before the commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business.
>
> Under this Section the informant must show to the commissioner that the place to be searched was being used (a) for the unlawful sale of intoxicating liquor (in which case a private residence may be searched) or, (b) it must be shown that the place to be searched is 'not a private residence used as such', or if it is a residence it is 'in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house'.
>
> The affidavit here under review does not charge defendant with having unlawfully *sold* intoxicating liquors, and it was therefore necessary for the informant to convince the commissioner that there was probable cause to believe that the premises to be searched (in this case, the defendant's 'house') were used in part for some business purpose such as 'a store, shop, saloon, restaurant, hotel or boarding house'. An essential fact not having been dis-

closed, the affidavit was insufficient to support the issuance of a warrant, and the evidence seized was improperly used upon the trial."

Finally the District Court of Massachusetts considered this question at length in the recent case of *U. S.* vs. *Palma,* 295 Fed. 149, where the affidavit read:

"I also have reason to believe and do believe and this is a matter of common report that liquor for commercial purposes is being manufactured in said premises."

We take the liberty of setting out in full the language of the court because it considers the various cases heretofore reported on the subject and lays down what in our opinion is the proper interpretation of the intention of Congress and the proper definition of the language of the statute:

"In *U. S.* vs. *Jajewsweic,* 285 Fed. 789, this court held that Sec. 25 of Title 2 of the National Prohibition Act (41 Stats. 315 (Comp. St. Ann. Supp. 1923, Sec. 10138½ m)) did not authorize a magistrate, upon evidence of manufacturing only, to issue a warrant for the search of a dwelling house which was not used in part for the purposes enumerated in the Section. The same conclusion has been reached in other jurisdictions. *U. S.* vs. *Kelih* (D. C.) 272 Fed. 484; *Joswich* vs. *U. S.* (C. C. A.) 288 Fed. 831. . . . I come to the broader and more important aspect, namely, the question whether the rule in the above cases is to be limited to private dwellings where liquor is being manufactured on a small scale, and not for commercial purposes. This is the contention of the Govern-

ment, and it is apparently based upon the theory that a dwelling house ceases to be a private dwelling, and is no longer entitled to the protection of Sec. 25 of National Prohibition Act, if any part of it (e. g. the cellar or the attic) is being devoted to the unlawful manufacturing of liquor on such a scale as to justify the magistrate in believing that it was being manufactured for ultimate sale. If this theory can be supported at all, it must be on one of two grounds:

First: That the dwelling was used in part for 'some business purpose' within the meaning of this section; or

Second: That it was being used in part for a 'shop' . . .

It seems to me that the legislative intent, as expressed in Section 25, is clear. The right to search for liquor was not to be extended to a private dwelling, unless it appeared that the dwelling house was used for the unlawful sale of intoxicating liquor, or unless it was in part used for some of the business purposes ennunciated in the act . . . The private dwelling must be used in part for a 'business purpose such as a store, shop, saloon, restaurant, hotel or boarding house,' all places where, as the experience of pre-prohibition days indicates, liquor might be sold, not places where it might be manufactured.

I can find no definition of the word 'shop' which could reasonably be held to include a distillery or a brewery, where ordinarily the business or manufacturing of intoxicating liquors is carried on, nor do I find in any reported case any decision supporting the proposition that, if a still is found in a private dwelling, the dwelling is being used for a shop. I am unable to adopt the view that, because a man sees fit to carry on an unlawful enterprise in his house, he thereby destroys the character of his

house as his dwelling place. As has been frequently pointed out in the cases arising under the Prohibition Act, the search warrant is the most drastic instrument which can be placed in the hands of an officer, and, when legislation is enacted extending the right to search and seizure in private dwellings, the courts ought not lend their sanction to any interpretation of this legislation which will extend the right beyond the clear and obvious intent thereof.

When application is made for a warrant to search a dwelling house which is not used for any of the business purposes enumerated in the act, it seems to me the proper question for the magistrate to consider is whether the building is occupied in good faith as his home by the party whose premises are to be searched. If it should appear that the dwelling house was not being used as a *bona fide* place of abode, but merely as a cover for illegal manufacture, a different situation would be presented."

A contrary view has been expressed in *In Re Mobile,* 278 Fed. 149.

In every other case wherein a private dwelling has been searched, either with or without a warrant, the business purpose justifying the search was either one actually specified in the Act, that is, a saloon (*U. S.* vs. *Crossen,* 264 Fed. 459; *U. S.* vs. *Magg,* 287 Fed. 356; *U. S.* vs. *McGuire,* 300 Fed. 98); a hotel (*U. S.* vs. *Masters,* 267 Fed. 581); a soft drink parlor (*Kathriner* vs. *U. S.,* 276 Fed. 808); or, as in *U. S.* vs. *Lepper,* 288 Fed. 136, a private dwelling where there was such additional evidence as the noise of bottles, movement of wooden cases in and out of the building, load-

ing of trucks and machines at the curb and a constant stream of visitors, the whole transaction occurring with an air of secrecy, all of which reasonably warranted a belief that liquor was being sold therein. In every one of these cases the public had direct and unrestricted access to the premises searched and some legitimate business purpose was served therein as a cloak for or as an auxiliary to the unlawful sale of liquor. On the contrary, in each of the Federal cases cited in support of our contention, the private dwellings, while perhaps used for an illegal purpose, confined the illegality to its own walls and no intercourse with the public was proved or charged.

The same question involved here has been considered in some of the States where the law prohibited the possession of liquor in a place of business but permitted it under restrictions in private dwellings. Thus in *Brooks* vs. *State,* 90 S. E. (Ga.) 989, the court said:

> "I charge you that by 'place of business' is meant public place of business; not public in the sense that it belongs to the public; not public in the sense that it must be done with any degree of publicity; but it must be a place to which the public is invited, either expressly or by implication to come for the purpose of trading or transacting business; and a place of that character to which the public is invited, where business is carried on, is a public place of business. It makes no difference whether the amount of business be great or small. By 'public' is meant that the public is invited to it and has access to it for the purpose within the scope of the business that is carried on."

See also *Jenkins* vs. *State,* 62 S. E. (Ga.) 574, where the court said:

> "One of the notions in the legislative mind was that to allow persons to keep liquors at their places of business would afford them the opportunity of using liquor to induce trade—a thing already forbidden by law. Another notion, we infer, was that the maintenance of an apparently legitimate business might be used as a cloak to conceal the carrying on of an unlawful traffic in liquors."

Particularly pertinent is the case of *Roberts* vs. *State,* 60 S. E. (Ga.) 1082, where the following appears:

> "The reasonable, common sense construction giving to the words their usual and popular significance is that a 'place of business', as used in the prohibition statute, means a place where the public generally are expressly or impliedly invited for the purpose of transacting business with the owner, and that a mere storeroom, to which the public is not invited, and from which the public is excluded, is in no sense a place of business within the meaning of the phrase, 'place of business' as used in the prohibition statute."

It cannot be seriously contended that plaintiff in error's premises were used as a shop, saloon, restaurant, hotel or boarding house, nor properly can it be termed a store. The mere fact that liquor was "stored" does not under any rational construction constitute a private dwelling a store. If that were so every dwelling containing liquor in any quantity,

without proof of sale, transportation or manufacture, must be a place of business even though the possession was for the exclusive personal use of the owner. The possibility that liquor might be sold would take the place of the proof of sale required by the Act. It would be of little assistance to this court to quote from or cite cases defining the word "store." Suffice it to refer to the exhaustive consideration of this question in Ann. Cas., 1913 E. at p. 1125, where numerous cases are cited which substantially agree in defining a store as a place where articles are bought and sold and are distinguished by the common and dominant characteristic of being open to the public.

We respectfully insist that the fact that plaintiff in error by *subsequent* affidavit and petition alleged that he owned the liquor seized and that from his description it appeared that it was intoxicating liquor, or that at the trial evidence may have been adduced which indicated that the liquor was illicit, must be disregarded by this court in its determination as to the *original validity* of the search warrant. No rule is more firmly established than that an illegal search can never be justified by successful results. If this were not so, no successful raid would be illegal. This fundamental principle has found expression by the courts many times, typical of which is the following:

*U. S.* vs. *Casino,* 281 Fed. 976:

> "The respondent argues that the petitioner's present assertion of ownership makes up any deficiency in the proof. So it does, but it cannot be used. If

> the petitioner had suffered a wrong, because his close had been violated and his chattels seized, it is not material that, to obtain redress, he is forced to disclose that he was guilty of a crime, nor does it make any difference that the facts so disclosed, if known to and stated by the prohibition agents, would have made the search and seizure legal. The constitution protects the guilty along with the innocent, for reasons deemed sufficient, into which I need not inquire. It means to prevent violent entries till evidence is obtained independently of the entries themselves, or of the admission involved in seeking redress for wrongs done. Were it not so, all seizures would be legal which turned out successful."

Finally, in this connection we suggest that if the interpretation of this court is correct the language of the statute becomes meaningless. There would be no point in declaring that a private dwelling could not be searched on a charge involving the violation of the Prohibition Act unless upon proof of *sale* of liquor therein, or unless it is being used for a business purpose, if every other violation of the Prohibition Act (i. e., unlawful possession or manufacture of liquor therein, or any other act denounced by this statute) would automatically constitute a partial use of the home for a business purpose. The obvious intent was that even though certain violations of the Prohibition law occurred in a private dwelling, no search could be made. Congress apparently was satisfied that for illegal transportation, or possession, or manufacture, of liquor, the private dwelling of the offender could

not be searched. As long as these violations of the statute were confined to the premises it was felt that the injury to the public generally was not sufficiently grave to warrant the invasion of his home with all the possibilities for injury and injustice which that might entail. The interpretation of this court which in effect considers illegal possession in a dwelling house as identical with its use for a business purpose warranting search and seizure, does violence to the undoubted intention of Congress.

Aside from the foregoing contention we again respectfully point out to this court that the search warrant does not pretend even on the basis of hearsay information to charge any illegal act as having occurred in the *shed* in the rear of the premises. It will be noticed that the affidavit in its statement of fact limits the illegal acts to the *garage* and fails absolutely to make any reference either as to the intoxicating nature of the liquor or its illicit origin or its illicit use except as respects the contents of the garage. For this reason likewise even under the theory of this court the search as respects the shed, as distinguished from the garage, was wholly unwarranted and to that extent at least the evidence was improperly admitted at the trial.

Our other main ground for reversal, to-wit: The admission over objection of evidence as to previous *arrests* of the plaintiff in error, this court dismisses upon the ground that even if error were committed, it was harmless in view of the fact that the possession of

the liquor was definitely established and the presumption of illegality raised by the statute was not overcome by any part of the testimony. Conceding for the moment that the search was legal and the evidence, therefore, admissible at the trial, it is true that no injury was done this plaintiff in error insofar as the charge against him was merely the unlawful possession of liquor. But in view of the fact that there was absolutely no other evidence to support the charge of maintaining a common nuisance, we earnestly urge that such evidence of arrest, repeated over objection and drawn out again by voluntary questions of the court and reiterated in its charge to the jury that they might take into consideration the fact, if they found it to be a fact, that the plaintiff in error had been *arrested* before as bootlegger, must have influenced the jury in finding a verdict of guilty on the nuisance charge. We pointed out in the opening brief that while a single sale of liquor might support a conviction of maintaining a nuisance, that was the extreme limit to which the decisions had gone, and that in this case the only evidence before the jury in support of either count was proof of mere possession of liquor. We feel that it needed only this additional suggestion of numerous previous arrests, without the slightest proof that the arrests were warranted or had resulted in convictions to turn the minds of the jury against this plaintiff in error on the nuisance charge and to that extent, at least, we feel that if there was error in the admission of the testimony, it must have been prejudicial.

For the foregoing reasons and particularly in view of the fact that this decision, rendered by a divided court, turns on an issue not heretofore fully discussed, or considered vital, we respectfully request that a rehearing be granted.

Dated, San Francisco, January 29, 1925.

Respectfully submitted,

YOUNG & HUDSON,
PRESTON & DUNCAN,
Attorneys for Plaintiff in Error.

B. F. RABINOWITZ,
Of Counsel.

I hereby certify that I am one of the attorneys for the Plaintiff in Error; that in my opinion the foregoing Petition for Rehearing is well taken in point of law and that the same is not interposed for the purpose of delay.

H. S. YOUNG.

No. 4357

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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R. A. AITON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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# Transcript of Record.

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**Upon Writ of Error to the United States District Court of the District of Arizona.**

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4357

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

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R. A. AITON,

Plaintiff in Error,

vs.

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# Transcript of Record.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

BENTON DICK, Phoenix, Arizona,
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Attorneys for Defendant in Error.

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C.–1462—PHOENIX.

United States of America,
District of Arizona,—ss.
In the District Court of the United States in and for the District of Arizona, at the April Term Thereof, A. D. 1922.

## INDICTMENT.

Viol. Sec. 1, Act of Dec. 17, 1914, as amended by Act of Feb. 24, 1919, issuing prescriptions for morphine and cocaine not in good faith and in the course of his professional practice only.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector

of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, on the 18th day of October, A. D. 1921, and within the said District of Arizona, did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one George Warner for a quantity of morphine sulphate, to wit: Fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said George Warner, not to effect a cure of the said George Warner in the course of his professional practice only, the said George Warner being then and there an habitual user of and addicted to the use of such narcotic drugs, nor to treat the said George Warner then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dipense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of said George Warner for such drug; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said George Warner, to whom the said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted [1*] to the use of, such narcotic drug; contrary to the form of

*Page-number appearing at foot of page of original certified Transcript of Record.

the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit: on the 14th day of November, A. D. 1921, and within the District of Arizona, R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, did unlawfully, wilfully, knowingly and feloniously and contrary to the act of Congress aforesaid, issue and write and deliver a prescription to one Herman Dunn for a quantity of morphine sulphate to wit: fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said Herman Dunn, not to effect a cure of the said Herman Dunn in the course of his professional practice only, said Herman Dunn being then and there an habitual user of and addicted to the use of such narcotic drugs, nor to treat the said Herman Dunn then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drug for the purpose of catering to and satisfying the cravings of the said Herman Dunn for such

drug; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said Herman Dunn, to whom the said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [2]

THIRD COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit: on the 25th day of January, A. D. 1922, and within the District of Arizona, R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, did unlawfully, wilfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one Camille Flynn for a quantity of morphine sulphate, to wit: forty-two grains of morphine sulphate, not in good faith for meeting the immediate needs of the said Camille Flynn, not to effect a cure of the said Camille Flynn in the course of his professional practice only, the said

Camille Flynn being then and there an habitual user of and addicted to the use of such narcotic drug, nor to treat the said Camille Flynn then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drug for the purpose of catering to and satisfying the cravings of the said Camille Flynn for such drug; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said Camille Flynn, to whom the said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid do further present that heretofore, to wit: on the 3d day of February, A. D. 1922, and within the District of Arizona, R. A. Aiton whose true and full name is to the Grand Jurors unknown, who was [3] then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of De-

cember 17, 1914, as amended, did unlawfully, wilfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one Oliver Flynn for a quantity of morphine sulphate, to wit: forty-two grains of morphine sulphate, not in good faith for meeting the immediate needs of the said Oliver Flynn, not to effect a cure of the said Oliver Flynn in the course of his professional practice only, the said Oliver Flynn being then and there an habitual user of and addicted to the use of such narcotic drug, nor to treat the said Oliver Flynn then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drug for the purpose of catering to and satisfying the cravings of the said Oliver Flynn for such drug; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said Oliver Flynn, to whom the said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit:

on the 7th day of February, A. D. 1922, and within the District of Arizona, R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, [4] did wilfully, unlawfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one George Walling for a quantity of morphine sulphate, to wit: fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said George Walling, not to effect a cure of the said George Walling in the course of his professional practice only, the said George Walling being then and there an habitual user of and addicted to the use of such narcotic drug, nor to treat the said George Walling then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drug for the purpose of catering to and satisfying the cravings of the said George Walling for such drug; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said George Walling, to whom the said prescription was written and delivered, in the unlawful and

felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SIXTH COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit: on the 9th day of February, A. D. 1922, and within the District of Arizona, R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the District and jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, did wilfully, unlawfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one Van McGehan for a quantity of morphine sulphate, to wit: fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said Van McGehan, not to [5] effect a cure of the said Van McGehan in the course of his professional practice only, the said Van McGehan being then and there an habitual user of and addicted to the use of such narcotic drug, nor to treat the said Van McGehan then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drug for the purpose of catering to

and satisfying the cravings of the said Van McGehan for such drugs; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said Van McGehan, to whom the said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SEVENTH COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit: on the 27th day of January, A. D. 1922, and within the District of Arizona, R, A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, did wilfully, unlawfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one Roy Mason for a quantity of morphine sulphate, to wit: fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said Roy Mason, not to effect a cure of the said Roy Mason in the course of his professional practice only,

the said Roy Mason being then and there an habitual user of and addicted to the use of such narcotic drug; nor to treat the said Roy Mason then and there suffering from an incurable or chronic [6] disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drug for the purpose of catering to and satisfying the cravings of the said Roy Mason for such drug; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said Roy Mason, to whom the said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EIGHTH COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit: on the 17th day of November, A. D. 1921, and within the District of Arizona, R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona as a physician under the

provisions of the Act of Congress of December 17, 1914, as amended, did wilfully, unlawfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deliver a prescription to one Harold Franklin for a quantity of morphine sulphate, to wit: one hundred and twelve grains of morphine sulphate, not in good faith for meeting the immediate needs of the said Harold Franklin, not to effect a cure of the said Harold Franklin in the course of his professional practice only, the said Harold Franklin being then and there an habitual user of and addicted to the use of such narcotic drug, nor to treat the said Harold Franklin then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispenese, distribute, barter and sell such narcotic drug for the purpose of catering to and satisfying the cravings of the said Harold Franklin for such drugs; and your Grand Jurors allege [7] that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium; and your Grand Jurors further say that the said Harold Franklin, to whom the said prescription was written and delivered, in the unlawful and felonious manner set forth above, was then and there the user of, and addicted to the use of, such narcotic drug; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

NINTH COUNT.

And your Grand Jurors aforesaid, upon their oath aforesaid do further present that heretofore, to wit: on the 8th day of February, A. D. 1922, and within the District of Arizona, R. A. Aiton, whose true and full name is to the Grand Jurors unknown, who was then and there a practicing physician within the said District and Jurisdiction aforesaid, and duly registered with the Collector of Internal Revenue for the District of Arizona, as a physician under the provisions of the Act of Congress of December 17, 1914, as amended, did wilfully, unlawfully, knowingly and feloniously and contrary to the act of Congress aforesaid, issue and write and deliver a prescription to one George P. Simpson for a quantity of morphine sulphate, to wit: fifty-six grains of morphine sulphate, and to other divers and sundry persons whose names the Grand Jurors are not able here to set forth, prescriptions for quantities of morphine sulphate and cocaine hydrochloride, not in good faith for meeting the immediate needs of the said George P. Simpson and the said divers and sundry persons aforesaid, not to effect a cure of any such person in the course of his professional practice only, the said George Simpson and the said other persons being then and there habitual users of and addicted to the use of such narcotic drugs, nor to treat such persons then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter, sell, exchange and give

away such narcotic drugs for the purpose of catering to and satisfying the cravings of such persons for such drugs; and your Grand Jurors allege that morphine sulphate, as the said R. A. Aiton then and there [8] well knew, is a compound, preparation and derivative of opium, and that, to the knowledge of the said R. A. Aiton, cocaine hydrochloride, is a derivative and preparation of cocoa leaves; and your Grand Jurors further say that the said George P. Simpson, to whom the said prescription was written and delivered, and the said divers and sundry persons aforesaid, to whom the said prescriptions were written and delivered; in the unlawful and felonious manner as set forth above, were then and there the users of, and addicted to the use of, such narcotic drugs; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FREDERIC H. BERNARD,
United States Attorney for the District of Arizona.

[9]

[Endorsed on back]: C.–1462 (Phoenix). In the United States District Court for the District of Arizona. United States of America vs. R. A. Aiton. Indictment. A True Bill. Jas. H. McClintock, Foreman of the Grand Jury.

Witnesses examined before the Grand Jury:

Will. S. Woods,
J. H. Fleming,
Camille Flynn,
Oliver Flynn,
V. M. McGehan,
Geo. Walling,
G. E. Goodrich,
Harold Franklin,
James H. Heckman,
F. P. Barnes,
Orville H. Brown,
R. W. Craig,
A. M. Tuthill.

Presented to the Court in the presence of the Grand Jury by their foreman, and filed this 12th day of May, A. D. 1922. C. R. McFall, Clerk. [10]

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Regular April Term, 1923, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, April 16, 1923.)

No. C. -1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—APRIL 16, 1923—ARRAIGNMENT.

The defendant, R. A. Aiton, is present in person and with his counsel, H. J. Sullivan, Esquire. The

United States Attorney for the District of Arizona is present for the Government.

The said defendant is duly arraigned before the bar of this court on the indictment returned against him, charging him with having issued prescriptions for morphine and cocaine not in good faith and in the course of his professional practice only.

On being called upon to plead thereto, said defendant states he is not guilty as charged in the indictment, which plea of not guilty is ordered entered.

WHEREUPON IT IS ORDERED that this case be set for trial May 7th, 1923. [11]

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In the United States District Court, District of Arizona.

No. C. -1462 (PHOENIX).

UNITED STATES OF AMERICA

vs.

R. A. AITON.

DEMURRER.

R. A. Aiton, defendant herein, demurs to the indictment herein, and for grounds of demurrer alleges:

I.

That the facts stated do not constitute a public offense.

II.

R. A. Aiton, defendant herein, demurs to the first

count of the indictment herein, and for grounds of demurrer alleges: that said first count in said indictment contained does not state facts constituting a public offense.

III.

R. A. Aiton, defendant herein, demurs separately and severally to the second, third, fourth, fifth, sixth, seventh, eighth and ninth counts in the alleged indictment contained and for grounds of demurrer alleges; that the facts alleged in said seperate counts in said indictment do not constitute a public offense.

WHEREFORE, defendant prays that his demurrer be sustained.

WELDON J. BAILEY,
Attorney for Defendant.

[Endorsed]: Demurrer. Filed Oct. 24, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [12]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minutes Entry of Wednesday, October 24, 1923.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—OCTOBER 24, 1923—ORDER OVERRULING DEMURRER.

The defendant, R. A. Aiton, is present in person with his counsel, W. J. Bailey, Esq.

Defendant's demurrer to the indictment herein is now heard.

IT IS THEREUPON ORDERED that said demurrer as to each count of the indictment is hereby overruled; defendant's exception to said ruling is allowed.

IT IS FURTHER ORDERED that this case is reset for trial on October 29th, 1923. [13]

In the United States District Court in the District of Arizona.

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

MOTION TO SUPPRESS EVIDENCE.

Counsel for defendant, R. A. Aiton, move this Honorable Court to make an order directing and ordering the United States District Attorney not to use any of the prescriptions alleged to have been written by this defendant and now in the possession of the United States District Attorney and the United States of America; and that he further be directed and ordered not to use any knowledge gained by his seizure and possession of said prescriptions in the prosecution of this cause; and that he be further directed and ordered not to use any prescription or any knowledge gained therefrom and alleged to have been written by this defendant in the prosecution of this cause for the reasons set out in the affidavit attached hereto and in support hereof.

That the seizure and detention of said prescriptions is in violation of the fourth and fifth amendments to the constitution of the United States and for that reason said prescriptions should be returned

and all evidence gained from said prescriptions should be suppressed.

WHEREFORE, defendant prays that his motion be granted.

WELDON J. BAILEY,
F. J. DUFFY,
Attorneys for Defendant.

AUTHORITIES:

Gouled vs. United States, 65 U. S. L. Ed. 647.

[14]

No. C.—1462 (PHOENIX).

AFFIDAVIT OF R. A. AITON.

State of Arizona,
County of Maricopa,—ss.

R. A. Aiton, being first duly sworn, deposes and says:

That he is the defendant in cause No. C.—1462 (Phoenix), which is the United States of America vs. R. A. Aiton; that prior to and at the time of this indictment this defendant was the duly licensed and practicing physician within the State of Arizona and duly registered with the Collector of Internal Revenue for the State of Arizona, as a physician under the provisions of the Act of Congress of December 17, 1914, as amended; that ever since the findings of said indictment this defendant has been, and now is, a duly licensed physician under and by virtue of the laws of the State of Arizona and residing in Phoenix, Arizona; that affiant is informed and verily believes and upon such informa-

tion and belief, says; that the United States District Attorney or certain officers of the United States of America, to him unknown, seized the sealed package in which certain prescriptions written by this defendant, were, and affiant says that said prescriptions are the identical prescriptions mentioned in the indictment aforesaid; that said prescriptions were taken by the aforesaid officers or officer from the druggist and out of the store of the druggist who filled said prescriptions and returned and sealed said prescriptions as provided by law; that said prescriptions were seized and are held by and at the instance of the United States of America and to the prejudice of this defendant because said prescriptions are of great value to this defendant and if introduced [15] in evidence in the trial of the cause now pending will seriously prejudice this defendant and will in fact compel the defendant to give evidence against himself; that affiant is informed and believes that the Government of the United States in the prosecution of this cause intends to use or attempt to use said written prescriptions seized and held, as aforesaid; that the seizure and detention of said prescriptions by the United States Government and its officers was and is unlawful and in violation of the constitutional rights of this defendant and prejudicial to his interest.

R. A. AITON.

Subscribed and sworn to before me this 30th day of October, 1923.

[Notarial Seal] WELDON J. BAILEY,
Notary Public.

My commission expires Sept. 1st, 1924.

[Endorsed]: Affidavit. Motion. Filed Oct. 30, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [16]

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Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, January 10, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. A. AITON,
Defendant.

ORDER DENYING MOTION TO SUPPRESS EVIDENCE.

Defendant's motion to suppress evidence is now heard,—

WHEREUPON, IT IS ORDERED that said motion to suppress evidence be and the same is

hereby DENIED; Exception is ordered noted for the defendant. [17]

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August 20, 1924.

The records of the U. S. District Court do not show that an amended demurrer was ever filed of record, and the same is not on file with this Court.

C. R. McFALL,
Clerk.
By Paul Dickason,
Chief Deputy Clerk. [18]

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Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, January 14th, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. A. AITON,
Defendant.

MINUTES OF COURT—JANUARY 14, 1924—ORDER OVERRULING AMENDED DEMURRER.

Defendant's amended demurrer is now heard and

the same is hereby ORDERED overruled. An exception is ordered entered for the defendant. [19]

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In the District Court of the United States, District of Arizona.

No. C.—1462 (PHOENIX).

THE UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

INSTRUCTIONS OFFERED BY DEFENDANT.

I.

You are instructed that taking all of the facts and evidence submitted to you in this case, if you have a reasonable doubt in your mind of the guilt of this defendant of the crime charged in the counts of this indictment, you must acquit him of the crime charged.

II.

You are instructed that the prescriptions written by this defendant prior to the 8th day of February, 1922, and which prescriptions are introduced in evidence were and are to be submitted to you in the consideration of this case, are not in and of themselves evidence of the guilt of this defendant.

III.

You are instructed that the writing of these prescriptions does not constitute a violation of the

Harrison Narcotic Act. If they were written in good faith and with the intent to relieve disease, and it does not matter of the amount of morphine prescribed is if it was not prescribed and given with the willful *in-* [20] intent to knowingly violate the provisions of the Harrison Anti-Narcotic Act.

IV.

You are instructed that if you do not find beyond a reasonable doubt that the defendant wrote these prescriptions with a willful intent to violate the provisions of the Harrison Narcotic Act, he is not guilty of the crime charged in this indictment.

V.

You are instructed that if the defendant wrote these prescriptions and prescribed for the persons named in the indictment in this case in the honest belief that they were suffering from incurable or chronic diseases and that the said morphine was prescribed for the relief of the said incurable or chronic diseases, then you must find that the defendant was prescribing morphine in the course of his professional duties and is not guilty of the crime charged.

VI.

You are instructed that if upon all the facts in this case you find that the defendant honestly believed that the giving of morphine to the persons named in the indictment was necessary to stop the progress of the incurable or chronic disease they were suffering from, even though in fact he made a mistake in writing said prescriptions, your verdict must be for an acquittal.

VII.

You are instructed that if you find that the prescriptions written by this defendant prior to February 8, 1922, and which [21] are in evidence in this case, were written for the sole purpose of enabling the defendant of this case to keep his patients in such a condition as to enable him to treat the chronic or incurable disease from which the said patients were, in his opinion suffering from, then you must find that these prescriptions are prescribed within the meaning of the Harrison Narcotic Act, and are not evidence of any crime on the part of this defendant.

VIII.

You are instructed that a reputable physician, duly in charge of *bona fide* patients, suffering from diseases known to be incurable, such as cancer, advanced tuberculosis, and many other diseases, may, in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotic drugs for such diseases, providing the patients are personally attended by the physician; that he regulate the dosage and prescribe no quantity greater than that ordinarily recognized by members of his profession to be sufficient for the proper treatment of the given case.

You are further instructed that if you find upon all the facts in this case that this defendant prescribed the prescriptions in evidence in this case for the purpose as stated above, you must find him not guilty of a violation of the Harrison Narcotic Act.

IX.

You are instructed that if upon all the facts in this case you find that any one of the persons named in this indictment was a drug addict, but was also suffering from any incurable disease or suffering from senility or the infirmities [22] attending old age, and are confirmed addicts of years standing, such addicts may be treated in the same manner as addicts suffering from incurable disease and the giving of morphine to such does not constitute a violation of the Harrison Narcotic Act.

*XI.*

You are instructed that an order issued by a practicing and registered physician for morphine to a habitual user thereof, the order being issued by him in the course of his professional treatment in an attempted cure of the habit and not for the sole purpose of providing the user with morphine sufficient to keep him comfortable, is a prescription within the meaning of Section 2 of the Harrison Narcotic Act. You are further charged that if upon all the facts you find that the prescriptions written by this defendant were issued for the above purpose then the issuance of said prescriptions does not constitute a violation of the Harrison Narcotic Act.

XII.

You are instructed that the prescriptions written after the date of the indictment upon which this defendant is being tried, are submitted to you for the sole purpose of and upon the sole issue of impeachment, if any there be, of a material part of

the defendant's testimony. You are further charged that the said impeachment, if any there be, must be of a material part of the indictment. You are further charged that if you find that there is no impeachment of any material part of the defendant's testimony then the said prescriptions written after the date of the indictment have no bearing upon the case *and* [23] and are not to be considered by you in deciding the facts in this case.

XIII.

You are instructed that the prescriptions written after date of this indictment are not evidence of the crime charged in the indictment and are not to be considered by you as being any part of the evidence upon which you are to base your findings of fact on this indictment.

XIV.

You are instructed that the intent of this defendant at the time these prescriptions in evidence that were issued before Feb. 8, 1922, were written is a fact to be decided by you upon all of the evidence.

XV.

You are further charged that if you should find upon all the facts in this case that this defendant intended at the time these prescriptions were written to give the said prescriptions for the relief or the treatment of a chronic or incurable disease then you must find that the defendant issued the said prescriptions in the course of his professional practice and within the provisions of the Harrison Narcotic Act.

XVI.

You are further instructed that if you find that at the time the prescriptions which are introduced in evidence in this case, were written by this defendant, he wrote them in the course of his professional practice in the attempted cure of a chronic or incurable, even though the persons were also known to him to be morphine addicts, then the amount prescribed and the number of doses is immaterial.

Above instructions refused, being covered by instructions given by the Court.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Jan. 24, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [24]

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No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,

Against

R. A. AITON,
Defendant.

VERDICT.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Guilty as charged in the first counts of the indictment, and Not Guilty as charged in the

second, fifth and eighth counts of the indictment. With recommendation for mercy.

C. W. LILLYWHITE,
Foreman.

[Endorsed]: Verdict. Filed Jan. 24, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [25]

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In the District Court of the United States, District of Arizona.

No. C.—1462 (PHOENIX).

THE UNITED STATES OF AMERICA

vs.

ROBERT A. AITON,

Defendant.

## MOTION FOR NEW TRIAL.

The defendant, Robert A. Aiton, moves this Honorable Court to vacate the verdict rendered against him in the above-entitled matter and grant unto him a new trial upon the following grounds:

I.

That the persistent cross-examination and examination of the witnesses for the defendant by the Judge of this Honorable Court resulted in prejudicing the jury against this defendant and prejudicing the rights of this defendant.

II.

That the Court committed error in the admission

of certain documents and other evidence over the objection of the defendant and to his prejudice.

III.

That the Court committed error in excluding certain evidence material to the defendant.

IV.

That the verdict of the jury is contrary to law and is not supported by the evidence.

V.

That the verdict of the jury is predicated upon perjured evidence, as shown by the affidavit of George Warner, marked Exhibit "A," attached hereto and made a part hereof.

WHEREFORE, defendant prays that his motion for new trial be granted.

WELDON J. BAILEY.
WIN WYLIE.
F. J. DUFFY.
C. H. YOUNG. [26]

EXHIBIT "A."

State of Arizona,
County of Maricopa,—ss.

George Warner, being first duly sworn, deposes and says:

That he is the identical person who testified in cause No. C.—1462 (Phoenix), entitled "The United States of America vs. R. A. Aiton," and that he is the identical person mentioned in the first count of the indictment in cause No. C.—1462 (Phoenix).

That in the year 1921 and prior to July 1st of

said year affiant applied to Dr. Harry R. Carson of Phoenix, Arizona, for medical treatment and Doctor Carson examined this affiant and diagnosed his case to be chronic syphilis and tuberculosis and prescribed morphine and other drugs for same; that in July, 1921, affiant applied to Doctor R. A. Aiton, for medical treatment and Doctor Aiton diagnosed affiant's disease to be that of chronic syphilis and tuberculosis and prescribed morphine and other medicines for him; that when affiant applied to Doctor Aiton he was sick, weak and in a very bad condition and was much lighter in weight at that time than now; that when he applied to Doctor Aiton he believed that he had syphilis and he still believes that he has syphilis and believes that a blood test will disclose chronic syphilis; that he further believes that Doctor Aiton administered morphine to this affiant in good faith and so administered the same for the purpose of meeting his physical needs and to quiet his pain and to sustain his body.

That after leaving Phoenix this affiant went to Los Angeles where he was treated by Doctor Rogers and the said doctor found that affiant had chronic syphilis and treated him for such disease and gave him eight or nine shots.

That affiant well knew Mr. Barnes, the narcotic inspector residing in Phoenix, Arizona, and visited his house many times and borrowed his car ten or fifteen times and talked with him upon many occasions and was at all times very friendly with him.

[27]

Affiant still believes that Doctor Aiton prescribed morphine to him in good faith and affiant knows that he needed such prescriptions to ease his pain and sustain his body.

That affiant in 1921 and subsequent thereto had severe ulcers upon his arm and three doctors said that such ulcers were caused from the syphilitic condition of this affiant and affiant verily believes that said ulcers were caused because of the syphilis which he had.

GEORGE WARNER.

Sworn to and subscribed before me this 28th day of January, 1924.

[Notarial Seal] WELDON J. BAILEY,
Notary Public.

My commission expires Sept. 1, 1924.

[Endorsed]: Motion for New Trial. Filed Jan. 23, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [28]

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In the United States District Court, District of Arizona.

No. C.—1462 (PHOENIX).

THE UNITED STATES OF AMERICA,

vs.

R. A. AITON,

Defendant.

## POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL.

It is within the sound discretion of this Court to grant a new trial.

The Court is without authority to arbitrarily refuse to grant a new trial.

Defendant is entitled to be convicted, if at all, upon definite, unwaivering, unsuspicious and truthful evidence.

The jury might have convicted upon George Warner's testimony only; the defendant is also entitled to the benefit of the doubt.

Three trial jurors made oath that they would not have convicted had it not been for the evidence and presence of George Warner; one juror could have prevented a conviction.

George Warner made oath, in writing, and during the trial of the Batchelder case, in substance to the effect that his material testimony, given at the trial of this defendant, was false.

George Warner should not be believed, and a verdict predicated upon his testimony should not stand.

The verdict of the jury in this case is predicated solely upon the perjured testimony of George Warner; no conviction [29] could have been had without the concurrence of the three trial jurors, making the three affidavits on file herein and these jurors say, under oath, that they would not have voted for

a conviction if it had not been for the testimony and presence of George Warner.

Pettine vs. Territory of New Mexico, 201 Fed. 489.

U. S. vs. Radford et al., 131 Fed. 378.

Bussen vs. State, 64 S. W. 268.

WELDON J. BAILEY,
WIN WYLIE,
F. J. DUFFY,
C. H. YOUNG,
Attorneys for Defendant.

[Endorsed]: Points and Authorities. Filed Feb. 12, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.

Also: Feb. 12, 1924. H. M. VanDenburgh, for the U. S. Attorney. [30]

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In the United States District Court, District of Arizona.

No. C.—1462 (PHOENIX).

THE UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

## MOTION TO ARREST JUDGMENT.

Defendant, R. A. Aiton, by his attorneys Weldon J. Bailey, Win Wylie, Frank J. Duffy, and Chas. H. Young, moves the Court to arrest the judg-

ment on the verdict herein and to discharge defendant, and assigns as reasons therefor that the act approved December 17, 1914, as amended by the act approved February 24, 1919, was and is repealed by the act of Congress approved November 23, 1921, to become effective January 1st, 1922, by Section 1400, Title XIV, General Provisions of the Revenue Act.

(42 U. S. Statutes at Large, Section 1400, Pages 320–321.)

WELDON J. BAILEY,
WIN WYLIE,
FRANK J. DUFFY,
CHAS. H. YOUNG,
Attorneys for Defendant.

POINTS AND AUTHORITIES.

42 United States Statutes at Large, Section 1400, Pages 320–321.

United States vs. Goodwin, 20 Fed. 237.

[Endorsed]: Motion to Arrest Judgment. Filed Feb. 13, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.

Received copy of the within this 13th day of February, 1924.

F. H. BERNARD. [31]

In the District Court of the United States for the District of Arizona.

PX. 1462—C.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT A. AITON,
Defendant.

RESISTANCE TO MOTION FOR NEW TRIAL AND MOTION TO ARREST JUDGMENT.

Comes now the plaintiff, the United States of America, by Frederick H. Bernard, United States Attorney for the District of Arizona, by George T. Wilson, Assistant United States Attorney for the District of Arizona, and resisting defendant's motion for a new trial and defendant's motion to arrest judgment, submits to the Court the affidavit of George E. Warner, hereunto attached, marked Exhibit "A," here referred to and made a part of this resistance to said motions as though fully set forth herein.

FREDERIC H. BERNARD,
United States Attorney for the District of Arizona.

GEORGE T. WILSON,
Assistant United States Attorney for the District of Arizona. [32]

In the District Court of the United States for the District of Arizona.

C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT A. AITON,

Defendant.

## AFFIDAVIT OF GEORGE E. WARNER.

United States of America,
District of Arizona,—ss.

I, George E. Warner, being first duly sworn, depose and say:

That I am the same George Warner mentioned and described in that certain affidavit signed by me on the 28th day of January, 1924, and attached to the motion for a new trial filed by defendant in the above-entitled action; that at the time I signed said affidavit I was incarcerated in the county jail of Maricopa County, Arizona, together with a number of other prisoners; that on said day I was lying in my bunk in my cell in said jail and was approached by another prisoner and handed an affidavit by him with the request that I sign same. I read said affidavit and at the request of said prisoner attached my signature to it. Thereupon said prisoner took said affidavit and left my presence. A few minutes later one Weldon J. Bailey, attorney for the de-

fendant in the above-entitled action, came up to the bars of my cell and asked me if I had signed said affidavit, and if that was my signature attached thereto, to which I responded that I had signed same and that said signature was mine; at the time I signed said affidavit no oath was administered to me by any one, nor was any oath administered to me as to the truth of the matters contained in said affidavit thereafter, and I have never sworn to said affidavit, or to any part thereof, and would not swear to said affidavit, because certain matters contained therein are not true.

That I make this affidavit voluntarily and of my own, free [33] will and do so for the purpose of correcting any impression that may get abroad to the effect that I have sworn to said purported affidavit attached to said motion for a new trial.

GEORGE E. WARNER.

Subscribed and sworn to before me this 1st day of February, A. D. 1924.

[Notarial Seal] EVAN S. STALLCUP,
Notary Public, Maricopa County, Arizona.
My commission expires Dec. 7, 1927.

[Endorsed]: Filed Feb. 15, 1924. C. R. McFall, Clerk, U. S. District Court, District of Arizona. By Paul Dickason, Chief Deputy. [34]

## AFFIDAVIT OF JOHN H. EASTERWOOD.

State of Arizona,
County of Maricopa,—ss.

John H. Easterwood, being first duly sworn, deposes and says:

That on the 28th day of January, 1924, and at the time George Warner subscribed a certain affidavit, this affiant was detained by the United States of America in the county jail of Maricopa County, and that in my presence and in the presence of Weldon J. Bailey, George Warner was sworn respecting the facts stated in said affidavit and after making oath that same were true he then subscribed said affidavit and immediately thereafter was requested to go into the presence of another witness where he stated that he did execute the affidavit and that the matters and things stated in said affidavit were true.

JOHN H. EASTERWOOD.

Subscribed and sworn to before me this 16th day of February, 1924.

[Notarial Seal] WELDON J. BAILEY,
Notary Public.

My commission expires Sept. 1, 1925.

[Endorsed]: Affidavits. Filed Feb. 16, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [35]

In the District Court of the United States, District of Arizona.

C.—1462 (PHOENIX).

THE UNITED STATES OF AMERICA,

vs.

R. A. AITON,

Defendant.

## PETITION FOR WRIT OF ERROR.

Now comes R. A. Aiton, defendant herein, by his attorneys, and says that on the 16th day of February, 1924, the Court entered judgment herein against this defendant, in which judgment and proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

WELDON J. BAILEY,
WIN WYLIE,
FRANK J. DUFFY,
C. H. YOUNG,
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed Feb. 16, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [36]

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In the District Court of the United States, District of Arizona.

No. C.—1462 (PHOENIX).

THE UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

## ASSIGNMENT OF ERRORS.

Now comes R. A. Aiton, the defendant in the above-entitled cause, by his attorneys, in connection with petition for writ of error herein, and makes the following assignment of errors, which he alleges occurred during the trial of said cause:

I.

The trial court erred in overruling the defendant's demurrer to the prescriptions seized by the United States narcotic agent without due process of law, in violation of Article IV of the constitution of the United States, which said prescriptions were used by the United States District Attorney before the grand jury in forming the indictment in this case.

II.

The trial court erred in overruling the defendant's motion to suppress evidence in the form of prescriptions which prescriptions were seized in an

illegal manner by the United States narcotic agent and used before the grand jury by the United States District Attorney in violation of Article V of the constitution of the United States, which provides that no man shall be compelled in any criminal case to be a witness against himself.

III.

The trial court erred in admitting incompetent evidence to the prejudice of the defendant in that the trial court allowed the prescriptions seized by the United States narcotic [37] agent in an illegal manner to be introduced in evidence against the defendant in that said prescriptions were seized in an illegal manner, contrary to the provisions of Article IV of the constitution of the United States, which provides that no evidence may be used against a defendant which were unlawfully seized.

IV.

The trial court erred in admitting incompetent evidence to this defendant's prejudice, in that the trial court admitted in evidence certain prescriptions signed by the defendant which prescriptions were illegally seized by the United States officers and which prescriptions in effect compelled the defendant to testify against himself, contrary to the provisions of Article V of the constitution of the United States.

V.

The trial court erred in admitting incompetent evidence to this defendant's prejudice, in that the trial court admitted in evidence certain prescriptions bearing date two months after the indictment

under which this defendant was tried, in that such prescriptions were admitted to show the intent of the defendant in the acts set forth in the indictment.

VI.

The trial court erred in admitting incompetent evidence to this defendant's prejudice, in that the trial court admitted in evidence certain prescriptions bearing date two months after the indictment and which said prescriptions were admitted in evidence by the Court not for the purpose of contradicting a material part of the evidence introduced on the issuance raised on the indictment in this case.

VII.

The trial court erred in that the trial court framed questions for the District Attorney to ask the defendant's [38] witnesses when the questions asked by the District Attorney had been objected to and the objection sustained, in that said conduct on the part of the trial court prejudiced the jury against the defendant in this cause.

VIII.

The trial court erred in refusing to admit material evidence in that the Court ruled out evidence of the so-called clinic under which clinic the defendant was issuing prescriptions at the time of the indictment.

IX.

The trial court erred in that the trial court without any objection to the evidence being raised by the counsel for the government or for the defendant, stopped a witness who was testifying to material

facts in the case, in that Doctor Carson, a witness for the defendant, in answer to a question by the defendant's attorney, was testifying as to the creation and maintenance of a certain clinic for the care and treatment of certain drug addicts, who were suffering from chronic or incurable diseases, thereby creating prejudice against this defendant before the jury not warranted by the evidence then before them.

X.

The trial court erred in refusing to give the following instruction:

> "You are instructed that a reputable physician duly in charge of *bona fide* patients suffering from diseases known to be incurable, such as cancer, advanced tuberculosis and many other diseases, may, in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotics for such diseases, providing the patients are personally attended by the physician; that he regulates the dosage and that he prescribe no quantity greater than that usually given by members of his profession and known to be sufficient for the purpose. [39]
>
> You are further instructed that if you find upon all the facts stated above that the defendant prescribed narcotics as stated, you must find him not guilty of a violation of the Harrison Narcotic Act."

XI.

The trial court erred in excluding evidence of-

fered by the defendant, which evidence was in effect as follows:

That a certain clinic had been created under the supervision of the Collector of Internal Revenue for this district and certain other officials who formed a clinic for the purpose of treating certain habitual users of morphine and who were also suffering from some chronic or incurable disease, in that such evidence was a material part of the case in that it had a direct bearing upon the intent of this defendant in filling out prescriptions upon which the indictment in this case was founded.

XII.

The trial court erred in ruling upon the question of law before the jury that all evidence of what narcotic agents did or said in regard to the prescriptions at the time they were inspected after their issuance by the defendant in this case was immaterial and not a part of the case, in that the said conversations were material to the case for the purpose of showing the intent of the defendant in issuing said prescriptions.

XIII.

The trial court erred in ruling out evidence to the prejudice of the defendant in that the trial court ruled as a matter of law that the wrappers placed on the bundles of prescriptions inspected by the narcotic agents, which said prescriptions and wrappers formed a part of the prescriptions filed required to be kept by the provisions of the Harrison Narcotic Act were material evidence of the intent and good [40] faith of the defendant in filling

the said prescriptions under the indictment which charged him with willfully, knowingly and feloniously filling illegal orders for narcotics.

XIV.

The trial court erred in that to the prejudice of the defendant in this case, he, during the course of the trial, ruled as followed:

> "that the law laid down by the Supreme Court of the United States in the cases of U. S. vs. Webb and U. S. vs. Moy was the law of this case and that the law of these two cases would be applied to the facts in this case."

That said statement was made before all the facts in this case were before the Court and at a time when it was impossible for the trial court to know what the facts in this case were and that said ruling had the effect of prejudicing the jury against this defendant in that it created a prejudice in the minds of the jury against this defendant, not founded on the facts in the case.

XV.

The trial court erred in overruling the motion for new trial on the part of the defendant for the reason that the evidence of George Warner, named in the count upon which the defendant was found guilty, was found by the Court to be perjured evidence.

WELDON J. BAILEY.
WIN WYLIE.
F. J. DUFFY.
C. H. YOUNG.

[Endorsed]: Assignment of Errors. Filed Feb. 16, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [41]

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Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, February 16, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—FEBRUARY 16, 1924—ORDER DENYING MOTION FOR NEW TRIAL AND MOTION TO ARREST JUDGMENT.

The defendant, R. A. Aiton, is present in person and by counsel, W. J. Bailey, F. J. Duffy, and C. H. Young, Esquires. The United States is represented by Geo. T. Wilson, Assistant United States Attorney.

Hearing is now had on defendant's motion for a new trial, whereupon, IT IS ORDERED that the said motion be and the same is hereby denied. An

exception to the ruling of the Court is duly entered on behalf of the defendant.

The defendant's motion in arrest of judgment is now heard, and the same is by the Court ORDERED denied. An exception to said ruling of the Court is duly entered for the defendant. [42]

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Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, February 16, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—FEBRUARY 16, 1924—JUDGMENT.

The defendant, R. A. Aiton, is present in person and with counsel, W. J. Bailey, F. J. Duffy, and C. H. Young, Esqs., and is now duly informed by the Court of the nature of the crime charged in the first count of the indictment herein, to wit, unlawfully issuing prescriptions for morphine sulphate not in good faith and in the course of his profes-

sional practice only, in violation of Section 1, Act of Dec. 17, 1914, as amended by the Act of February 24, 1919; of his trial and conviction thereof by jury.

And no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows:

That the said defendant having been duly convicted of said crime, the Court now finds him guilty thereof, and does

ORDER, ADJUDGE AND DECREE that as a punishment therefor, he, the said R. A. Aiton, shall be imprisoned for the term of Two (2) years in the United States Penitentiary at Leavenworth, Kansas, said term to date from date of his delivery to the Warden of the aforesaid penitentiary. [43]

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In the District Court of the United States in and for the District of Arizona.

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

ORDER FOR WRIT OF ERROR AND BOND ON APPEAL.

Now, on this 16th day of February, 1924, comes R. A. Aiton, defendant in the above-entitled cause, and presents to the Court his petition for a writ of

error from the United States District Court of the District of Arizona and certain assignments of error attached to said petition and moves the Court to grant the prayer of said petition and to allow a writ of error as prayed for.

IT IS ORDERED by the Court that said writ of error be and it is hereby allowed and that said writ of error shall operate as a supersedeas and that no further proceedings shall be had in this cause in this court until the final determination thereof in the United States Circuit Court of Appeals in and for the Ninth Circuit upon the filing and the approval by the Court of a bond in the penal sum of Five Thousand Dollars ($5,000.00) with sureties thereon.

F. C. JACOBS,
United States District Judge, District of Arizona.

[Endorsed]: Filed Feb. 16, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [44]

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In the District Court of the United States in and for the District of Arizona.

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

APPEARANCE BOND ON WRIT OF ERROR.

That we, R. A. Aiton, as principal, and E. W. Taylor, of Phoenix, Arizona, and L. B. Stephens, of Phoenix, Arizona, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of February, in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately at the October term, A. D. 1923, of the District Court of the United States for the District of Arizona, in a suit pending in said court between the United States of America, plaintiff, and R. A. Aiton, defendant, a judgment and sentence was rendered against the said R. A. Aiton, and the said R. A. Aiton has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reserve the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America [45] to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said R. A. Aiton shall appear in the

United States Circuit Court of Appeals for the Ninth Circuit at the next regular term thereof and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; else to remain in full force, virtue and effect.

R. A. AITON.
E. W. TAYLOR.
L. B. STEPHENS.

State of Arizona,
County of Maricopa,—ss.

E. W. Taylor and L. B. Stephens, the sureties in the within undertaking, being duly sworn, each for himself and not one for the other, says that he is worth the sum of Five Thousand Dollars ($5,000.00) over and above all his just debts and liabilities, and over and above all property [46] exempt by law from execution and forced sale, and that he is a resident freeholder within the State of Arizona.

E. W. TAYLOR.
L. B. STEPHENS.

Subscribed and sworn to before me this 16th day of February, 1924.

[Notarial Seal] D. A. LITTLE,
Notary Public.

My commission expires December 31, 1924.

Approved.

F. C. JACOBS,
Judge of the United States District Court, in and for the District of Arizona.

[Endorsed]: Deft. having been surrendered into custody in open court July 11, 1924, by the sureties on the within bond and requested that they be exonerated from liability thereon, IT IS HEREBY ORDERED that said bond and the sureties thereon be and they hereby are exonerated and discharged from any further liability and said bond exonerated.

Dated July 11, 1924.

F. C. JACOBS,
U. S. Dist. Judge.

[Endorsed]: Filed Feb. 16, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [47]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, February 21st, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—FEBRUARY 21, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY ORDERED BY THE COURT that the defendant, R. A. Aiton, is allowed thirty (30) days from the 4th day of February, 1924, in which to prepare and file and cause to be settled this bill of exceptions herein.

On motion of the United States Attorney, an exception to the Court's ruling is duly entered on behalf of the United States. [48]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, March 1st, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—MARCH 1, 1924—ORDER EXTENDING TIME TO AND INCLUDING MARCH 18, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY ORDERED that the time is extended to and including March 18, 1924, for the defendant to prepare and file his bill of exceptions herein. It is ordered that an exception is saved to the Government. [49]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, March 17th, 1924.)

No. C—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—MARCH 17, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

IT IS ORDERED that the time that the defendant may have in which to prepare, serve and file his bill of exceptions in this case is hereby extended for five (5) days from the 17th day of March, 1924.

An exception on behalf of the Government is duly entered. [50]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, March 21st, 1924.)

No. C—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—MARCH 21, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

W. J. Bailey, Esq., is present for the defendant, and on motion of said counsel,—

IT IS ORDERED that the time to prepare, serve and file defendant's bill of exceptions herein be and the same is hereby extended one week from the 22d day of March, 1924.

An exception is noted on behalf of the Government. [51]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, March 29, 1924.)

No. C—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—MARCH 29, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

W. J. Bailey, Esq., is present on behalf of the defendant, and on motion of said counsel,—

IT IS ORDERED that the time that defendant may have in which to prepare, serve and file his bill of exceptions herein is hereby extended eleven (11) days from this date.

An exception is entered for the Government. [52]

In the District Court of the United States, District of Arizona.

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above-entitled cause came on for trial on the 14th day of January, 1924, being one of the days of the October term of said court, before the Honorable Fred C. Jacobs, one of the Judges of the United States District Court of the United States of America, District of Arizona, and a jury duly impanelled.

GEO. T. WILSON, Assistant U. S. Attorney, Appeared as Counsel for the Government.

WELDON J. BAILEY and BENTON DICK, Appeared as Counsel for the Defendant. [53]

I.

The Government introduced in evidence many prescriptions for narcotic drugs admittedly written by the defendant and filled for and used by patients of defendant, which said patients defendant testified were suffering from chronic or incurable disease; that the said prescriptions were written, filled and used prior to the date of the indictment upon which the defendant was tried.

That over the objection of the defendant, the Court admitted many prescriptions for narcotic drugs admittedly written by the defendant and bearing dates from one to two months subsequent to the date of the arrest of defendant; that said prescriptions were introduced by Government to rebut defendant's testimony that when informed of his violation of law by his arrest said defendant did not write any more prescriptions.

To the introduction of the said prescriptions defendant then and there duly objected upon the grounds that said prescriptions were immaterial, incompetent and irrelevant, and because proof of a criminal act after the alleged crime does not show intent to commit a prior crime, and said objection being overruled by the Court, defendant then and there excepted to said ruling and still excepts.

II.

The United States Attorney, during the trial of the cause propounded several questions, to which questions counsel for the defendant then and there duly objected and were sustained; that the Court came to the assistance of the United States Attorney and framed the questions objected to for him and permitted said questions so framed by the Court to be asked by the United States Attorney and answered by the witnesses over the objection of counsel for the defendant, to which ruling the defendant by his counsel then and there duly excepted, the ground of objection being that the interference of the Court prejudiced the rights of the defendant

unduly and not warranted by the evidence or the circumstances. [54]

III.

That defendant offered to show by Dr. Carson and other witnesses that after a conference held by such witnesses for the purpose of considering what was best to be done to control and regulate the use of narcotic drugs in Phoenix, they concluded that the known addicts should be referred to one doctor and kept under his care and treatment.

Defendant offered to show further that Mr. F. P. Barnes, local Narcotic Agent at that time and subsequent thereto, directed many addicts to the defendant and requested said defendant to treat said addicts and to prescribe narcotics for them and that pursuant thereto said defendant did write a large number of the prescriptions for narcotic drugs offered in evidence by the Government.

To the aforesaid offers by the defendant, the Government duly objected, which said objection was sustained by the Court and defendant then and there duly excepted and still excepts.

IV.

Dr. Carson, a witness for the defendant, upon cross-examination by the United States Attorney was answering a question propounded to him by the United States Attorney and in his answer attempted to explain the creation and maintenance of a clinic for the care and treatment of drug addicts who had been referred to the clinic and who were known to be suffering from chronic or incurable diseases and while the witness was so testifying,

the Court, in the absence of any objection by either side, interfered and admonished the witness not to testify to the establishment or maintenance of any clinic for said purpose, to which said interference and conduct by the Court defendant then and there objected upon the grounds that the prescriptions given by defendant to drug addicts pursuant to the clinic, established defendant's good intention, and that the interference by the Court prejudiced the jury against the defendant, and being overruled the defendant then and there excepted and still excepts. [55]

V.

Defendant offered to show that the narcotic drug prescriptions written by defendant and introduced in evidence by the Government had been inspected by a certain Narcotic Agent of the Federal Government after they had been filled and while in the hands of the druggist who filled same, and that said Narcotic Agent had endorsed thereon his approval and O. K. of said prescriptions; that said approval or O. K. of said narcotics was offered for the purpose of showing that defendant did not wilfully, knowingly and feloniously illegally prescribe narcotic drugs for drug addicts and for the purpose of showing the good intention in the course of the professional practice of the defendant. The offer being objected to by the Government and the objection sustained by the Court, defendant then and there excepted and still excepts.

VI.

Defendant offered to show that many of the pre-

scriptions introduced in evidence by the Government were written by defendant under and pursuant to a clinic created by certain parties for the purpose of guarding and guaranteeing the lawful use of narcotic drugs administered to those suffering from chronic or incurable diseases. To said offer the Government then and there objected and said objection being sustained by the Court, the defendant then and there duly excepted and still excepts.

VII.

That during the course of the trial the Court announced that the rulings laid down by the Supreme Court of the United States in the case of the United States vs. Webb and the United States vs. Jin Fuey Moy would be applied in this trial, and said statements by the Court and in the presence of the jury had the effect of prejudicing the jury against the defendant because the rulings of the Court in this cause were not founded upon facts then submitted or thereafter submitted during the course of the trial, [56] to which statements and ruling the defendant duly objected and being overruled by the Court duly excepted and still excepts.

VIII.

Counsel for the defendant then and there and before the jury retired requested the Court to charge the jury as follows:

> "You are instructed that a reputable physician duly in charge of *bona fide* patients suffering from diseases known to be incurable, such as cancer, advanced tuberculosis and many

other diseases, may in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotics for such diseases, providing the patients are personally attended by the physician; that he regulates the dosage and that he prescribe no quantity greater than that usually given by members of his profession and known to be sufficient for the purpose.

"You are further instructed that if you find upon all the facts stated above that the defendant prescribed narcotics as stated, you must find him not guilty of a violation of the Harrison Narcotic Act."

The defendant by his counsel then and there and before the jury retired excepted to the ruling of the Court in failing to charge the jury as above requested by the defendant.

Whereupon the jury retired and brought in a verdict finding the defendant guilty upon the first count only of the indictment.

IX.

Thereupon defendant moved the Court to set aside the verdict and grant a new trial to defendant, said motion being overruled by the Court, defendant then and there excepted and still excepts.

X.

Whereupon the Court entered judgment upon the verdict and sentenced the defendant to two years in the Federal Penitentiary to which ruling and judgment of the Court the defendant then and there duly excepted and still excepts.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular, and [57] it is hereby settled and allowed and made a part of the record of this cause.

Done in open court this 28th day of May, A. D. 1924.

F. C. JACOBS,
U. S. District Judge.

[Endorsed]: Bill of Exceptions. Filed May 28, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [58]

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Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Wednesday, May 28th, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. A. AITON,
Defendant.

MINUTES OF COURT—MAY 28, 1924—ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

IT IS ORDERED BY THE COURT that defendant's bill of exceptions filed herein be and the same is hereby settled and allowed. [59]

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Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, July 11, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—JULY 11, 1924—ORDER RE SUPERSEDEAS BOND.

The defendant, R. A. Aiton, is present in person with his counsel, Benton Dick, Esquire.

The bondsmen of the defendant now formally tender in open court the defendant to the custody of the Court and request that they be exonerated

as sureties on the bond of said defendant, R. A. Aiton.

IT IS THEREUPON ORDERED that the present supersedeas bond on file stand in full force and effect until the Court satisfies itself as to its jurisdiction in the matter of the exoneration of said bondsmen, the case of said defendant Aiton now being on appeal to the Circuit Court of Appeals for the Ninth Circuit. [60]

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Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, July 11, 1924.)

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

MINUTES OF COURT—JULY 11, 1924—ORDER EXONERATING SURETIES ON SUPERSEDEAS BOND.

The sureties on the defendant's supersedeas bond herein having surrendered the defendant R. A. Aiton in open court and moved the Court that said

bond be exonerated and that they and each of them be released from liability thereon, and the Court having granted said motion and ordered said defendant in custody of the United States Marshal, and defendant having immediately furnished a good and sufficient supersedeas bond which has been approved by the Judge of this court,—

IT IS HEREBY ORDERED that the said defendant, R. A. Aiton, be discharged from custody pending his appeal on the judgment herein. [61]

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In the United States District Court, District of Arizona.

No. C.—1462—PHOENIX.

THE UNITED STATES OF AMERICA

vs.

R. A. AITON,

Defendant.

PRAECIPE FOR PAPERS AND RECORD ON WRIT OF ERROR TO UNITED STATES CIRCUIT COURT OF APPEALS.

To the Clerk of the United States District Court, District of Arizona:

Notice is hereby given that R. A. Aiton, the defendant and plaintiff in error herein, specifies the following papers and portions of the record in the above-entitled cause which he deems necessary and proper to present the questions involved in the hearing on writ of error, and respectfully request that

you transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the following papers and portions of the record:

1. Original indictment.
2. Demurrer to indictment.
3. Order overruling demurrer to indictment.
4. Minute entry of defendant's plea to indictment.
5. Defendant's motion to suppress evidence.
6. Order denying defendant's motion to suppress evidence.
7. Amended demurrer.
8. Order overruling defendant's amended demurrer and notation of exception.
9. Motion for new trial.
10. Order denying defendant's motion for new trial and exception.
11. Motion in arrest of judgment.
12. Order denying defendant's motion in arrest of judgment and exception.
13. Judgment.
14. Order allowing writ of error to U. S. Circuit Court of Appeals.
15. Order (Feby. 21, 1924) allowing defendant 30 days from 4th day of February to prepare and file bill of exceptions. [62]
16. Order (Mch. 1, 1924) extending time to prepare and file bill of exceptions to March 18th.
17. Order (Mch. 17) extending time five days from Mch. 17, 1924, to prepare and file defendant's bill of exceptions.

18. Order (Mch. 29, 1924) extending time to prepare and file bill of exceptions one week.
19. Bill of exceptions filed May 28, 1924.
20. Order settling and allowing defendant's bill of exceptions, dated May 28th, 1924.
21. Original appearance bond on writ of error to U. S. Circuit Court of Appeals.
22. Order granting motion to release sureties on original appearance bond on writ of error.
23. Order (July 11, 1924) approving new appearance bond on writ of error to U. S. Circuit Court of Appeals, and discharging defendant pending appeal.
24. Assignment of errors filed February 16, 1924.
25. Petition of defendant for writ of error.
26. Citation for writ of error.
27. Affidavit of John H. Easterwood, filed Feby. 16, 1924.
28. Points and authorities filed by defendant Feby. 12, 1924.
29. Instructions requested by defendant and refused by Court.
30. Verdict of jury filed January 24, 1924.
31. Resistance to motion for new trial and motion to arrest judgment and affidavit of George Warner, Exhibit "A."
32. Motion (October 30, '23) for order directing U. S. Attorney not to use any of prescriptions alleged to have been written by defendant and affidavit of defendant.

33. This notice.

BENTON DICK,
Attorney for Plaintiff in Error.

Dated this 25th day of July, 1924.

[Endorsed]: Praecipe for Record and Papers on Writ of Error to U. S. Circuit Court of Appeals. Filed July 25, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk.

Also: Service of copy ack. this 25th day of July, 1924. Geo. T. Wilson, (May), Asst. U. S. Attorney. [63]

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In the District Court of the United States, in and for the District of Arizona.

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. A. AITON,
Defendant.

WRIT OF ERROR.

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between the United States of America,

plaintiff, and R. A. Aiton, defendant, manifest error has happened to the great damage of the said defendant, as by his complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, within thirty (30) days from the date of this writ, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States Supreme Court, this 2d day of August, in the year of our Lord one thousand nine hundred twenty-four.

[Seal] C. R. McFALL,
Clerk.

[Endorsed]: Filed Aug. 2, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy. [64]

## RETURN ON WRIT OF ERROR.

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal] C. R. McFALL,
Clerk.
By Paul Dickason,
Chief Deputy Clerk.

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In the District Court of the United States in and for the District of Arizona.

No. C.—1462 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. A. AITON,
Defendant.

## CITATION ON WRIT OF ERROR.

The President of the United States to the Honorable FREDERIC H. BERNARD, United States Attorney for the District of Arizona, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein R. A. Aiton is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the United States District Court for the District of Arizona, this 2d day of August, A. D. 1924.

F. C. JACOBS,
United States District Judge.

The foregoing citation received Aug. 2d, 1924.

GEO. T. WILSON,
Asst. U. S. Atty.

[Endorsed]: Filed Aug. 2, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy. [65]

In the District Court of the United States in and for the District of Arizona.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. A. AITON,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of United States of America, Plaintiff, versus R. A. Aiton, Defendant, said case being numbered Criminal 1462 on the docket of the Phoenix Division of said court.

I further certify that the foregoing 65 pages, numbered from 1 to 65, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there are also annexed to said transcript the original writ of error and the original citation on writ of error issued in said cause.

And I further certify that the cost of preparing and certifying to said record, amounting to Thirty and 50/100 Dollars ($30.50), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said court, this 21st day of August, 1924.

[Seal] C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk. [66]

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[Endorsed]: No. 4357. United States Circuit Court of Appeals for the Ninth Circuit. R. A. Aiton, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received August 23, 1924.

F. D. MONCKTON,
Clerk.

Filed October 11, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In The

# United States Circuit Court of Appeals

For The

# Ninth Circuit

R. A. AITON,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

No. 4357

## Brief of Plaintiff In Error

BENTON DICK,

.....,

Arthur L. Goodwin,

*Attorneys for Plaintiff in Error.*

Filed this.....day of January, 1925.

.....,

*Clerk, U. S. Circuit Court of Appeals.*

In The

# United States
# Circuit Court of Appeals

For The

# Ninth Circuit

R. A. AITON,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

No. 4357

## Brief of Plaintiff In Error

### STATEMENT OF THE CASE

R. A. AITON, the plaintiff in error, was indicted on the 12th day of May, 1922, by a Grand Jury of the United States District Court for the District of Arizona, at Phoenix, Arizona, for a violation of Section 1, Act of December 17th, 1914, as amended by Act of February 24th, 1919, commonly known

as the Harrison Narcotic Drug Act, for the alleged offense of issuing prescriptions for morphine and cocaine, not in good faith and in the course of his professional practice only. He was tried by a jury which returned a verdict of guilty as charged in the first count of the indictment and the Court imposed a sentence of two years in the United States Penitentiary at Leavenworth.

From the judgment and order of the United States District Court for the District of Arizona, overruling defendant's motion for a new trial and motion in arrest of judgment, the case is brought to this Court on a writ of error.

The indictment contains nine separate counts, similar in form, in which it is alleged that prescriptions for certain narcotic drugs were issued, written and delivered by the defendant to nine different persons on various dates, not in good faith to meet the immediate needs of such persons, nor to effect cures, but on the contrary, with the intent and purpose to dispense, distribute, barter and sell the narcotic drugs mentioned for the purpose of catering to and satisfying the cravings of those persons, and not in the course of his professional practice only.

It is alleged in the first count of the indictment in question that the plaintiff in error, while a practicing physician within the District of Arizona and duly registered with the Collector of Internal Revenue for said District, as a physician, under the pro-

visions of the Act of Congress of Dec. 17th, 1914, as amended, on the 18th day of October, 1921, and within said District of Arizona, did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the Act of Congress aforesaid, issue and write and deiver to one George Warner a prescription for a quantity of morphine sulphate, to-wit: fifty-six grains of morphine sulphate, not in good faith for meeting the immediate needs of the said George Warner, not to effect a cure of the said George Warner in the course of his professional practice only, the said George Warner being then and there an habitual user of and addicted to the use of such narcotic drugs, nor to treat the said George Warner then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of said George Warner for such drug; that morphine sulphate, as the said R. A. Aiton then and there well knew, is a compound, preparation and derivative of opium, and that the said George Warner, to whom said prescription was written and delivered, in the unlawful and felonious manner as set forth above, was then and there the user of, and addicted to the use of, such narcotic drugs; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

For reasons unknown to present counsel for the plaintiff in error, no Court reporter was present at the trial of this case. Therefore, we are unable to furnish a reporter's transcript of the evidence, and other proceedings, and will have to rely upon errors appearing in the record as we find it.

The record discloses the fact that numerous errors were committed by the trial Court in the admission of incompetent and illegal evidence of a highly prejudicial nature, offered by the Government, and in the rejection of competent, legal evidence offered by the defendant, tending to show good faith in the issuance of the prescriptions in question, and the lack of any criminal intent, although no specific intent to violate the law need be shown in this class of cases.

The defendant interposed a demurrer to the indictment upon the ground that the facts stated do not constitute a public offense, but the same was overruled.

Before the trial of the case, the defendant filed a motion to suppress certain prescriptions which the Government proposed to use as evidence against him. This motion was supported by the affidavit of the defendant, based upon information and belief, to the effect that officers of the Government, to him unknown, seized a sealed package containing prescriptions written by the defendant, and that such prescriptions were the identical prescriptions

mentioned in the indictment, and that they were taken by the officers from the store of the druggist who filled the same.

This motion was denied and the prescriptions were introduced in evidence at the trial of the case, to the prejudice of the defendant and in violation of his constitutional rights.

The defendant filed a motion for a new trial upon the ground that the persistent cross-examination of the learned trial judge prejudiced the rights of the defendant; that error was committed in the admission of certain documents and other evidence; that error was committed in excluding certain material evidence offered by the defendant; that the verdict is contrary to law and not supported by the evidence; that the verdict of the jury is predicated upon perjured evidence, as shown by the affidavit of George Warner, the chief witness for the Government, and to whom the prescription mentioned in the first count of the indictment, was issued. This motion was denied.

The defendant then filed a motion in arrest of judgment upon the ground that the Act approved December 17th, 1914, as amended by the Act approved February 24th, 1919, was repealed by the Act of Congress approved November 23, 1921, to become effective January 1st, 1922, by Section 1400, Title XIV, General Provisions of the Revenue Act.

This motion was also denied, whereupon the Court imposed sentence. Thereafter, the defendant filed a petition for a writ of error.

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## ASSIGNMENT OF ERRORS

### I.

The Court erred in overruling the defendant's demurrer to the prescriptions seized by the United States narcotic agent without due process of law, in violation of Article IV of the constitution of the United States, which said prescriptions were used by the United States District Attorney before the Grand Jury.

(Ab. of Record, p. 41, pgh. I.)

### II.

The Court erred in overruling defendant's motion to suppress evidence in the form of prescriptions which were seized in an illegal manner by the United States narcotic agent and used before the Grand Jury by the United States District Attorney in violation of Article V of the Constitution of the United States, which provides that no man shall be compelled in any criminal case to be a witness against himself.

(Ab. of Record, p. p. 41-42, pgh. II.)

(Ab. of Record. p. p. 18-19-20-21.)

III.

The Court erred in admitting incompetent evidence to the prejudice of the defendant in that the trial Court allowed the prescriptions seized by the United States narcotic agent in an illegal manner to be introduced in evidence against the defendant, in that said prescriptions were seized in an illegal manner, contrary to the provisions of Article IV of the Constitution of the United States, which provides that no evidence may be used against a defendant which was unlawfully seized.

(Ab. of Rec., p. 42, pgh. III, F. 37.)

(Bill of Exceptions, See Ab. of Rec., p. 59-60.)

IV.

The Court erred in admitting incompetent evidencedence to the prejudice of defendant, in that certain prescriptions signed by the defendant were illegally seized by United States officers, which, in effect, compelled the defendant to testify against himself, contrary to the provisions of Article V of the Constitution of the United States.

(Ab. of Rec., p. 42, F. 37, pgh. IV.)

V.

The Court erred in admitting incompetent evidence to defendant's prejudice, in that certain prescriptions bearing date two months after the indict-

ment under which defendant was tried, were admitted to show the intent of the defendant in the commission of the acts set forth in the indictment.

(Ab. of Rec., pp. 42 and 43, pgh. V, F. 37.)

(See Bill of Exceptions, Ab. of Rec., p.p. 59-60.)

VI.

The Court erred in admitting incompetent evidence to the defendant's prejudice, in that certain prescriptions bearing date two months after the indictment were admitted not for the purpose of contradicting any material evidence introduced on the issues raised on the indictment.

(Ab. of Rec., p. 43, pgh. VI, F. 37.)

(See Bill of Exceptions, Ab. of Rec., p. 60, pgh. I.)

VII.

The Court erred in framing questions for the United States District Attorney to ask the defendant's witnesses after objections to questions propounded by the District Attorney had been sustained, in that said conduct on the part of the trial judge prejudiced the jury against the defendant.

(Ab. of Rec., p. 43, pgh. VII, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 60, pgh. II.)

VIII.

The Court erred in refusing to admit material evidence offered by the defendant, in that material evidence of a so-called clinic under which defendant was issuing prescriptions at the time of the indictment, was ruled out.

(Ab. of Rec., p. 43, pgh. VIII, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 61, pgh. III, F. 54.)

IX.

The Court erred in refusing to permit a witness for the defendant who was testifying to material facts, without objection on the part of counsel for the Government, to answer a question as to the creation of a clinic, Doctor Carson being the witness, and who was testifying as to the creation and maintenance of a certain clinic for the care and treatment of certain drug addicts who were suffering from chronic or incurable diseases, thereby creating prejudice against the defendant.

(Ab. of Rec., p.p. 43-44, pgh. IX, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 61, pgh. 111, F. 54.)

X

The Court erred in refusing to give the following instructions: "You are instructed that a reputable

physician duly in charge of bona fide patients suffering from diseases known to be incurable, such as cancer, advanced tuberculosis and many other diseases, may in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotics for such diseases, providing the patients are personally attended by the physician, that he regulates the dosage, that he prescribe no quantity greater than that usually given by members of his profession and known to be sufficient for the purpose (39).

You are further instructed that if you find upon all the facts stated above that the defendant prescribed narcotics as stated, you must find his not guilty of a violation of the Harrison Narcotic Act."

(Ab. of Rec., p. 44, pgh. X, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p.p. 63-64, F. 56.)

XI.

The Court erred in excluding evidence offered by the defendant to show that a certain clinic had been created under the supervision of the Collector of Internal Revenue for this district and that certain other officials who formed a clinic for the purpose of treating certain habitual users of morphine and who were also suffering from some chronic or incurable disease; such evidence was a material part of the defendant's case in that it had a direct bear-

ing upon the question of the intent of the defendant in filling out the prescriptions upon which the indictment in this case was founded.

(Ab. of Rec., p.p. 44-45, pgh. XI, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p. 62, 63, pghs. V and VI, F. 55.)

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XII.

The Court erred in ruling upon the question of law that all evidence of what narcotic agents said or did in regard to the prescriptions at the time they were inspected after their issuance by the defendant was immaterial and not a part of the case, in that the said conversations were material for the purpose of showing the intent of the defendant in issuing said prescriptions.

Ab. of Rec., p. 45, pgh. XII, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p.p. 62-63, pghs. V and VI, F. 55.)

XIII.

The Court erred in ruling out evidence to the prejudice of the defendant, in that, as a matter of law, the wrappers placed on the bundles of prescriptions inspected by the uarcotic agents, which said prescriptions and wrappers formed a part of the prescriptions filed required by the provisions

of the Harrison Narcotic Act were material evidence of the intent and good faith of the defendant in filling the said prescriptions; the indictment charging him with wilfully, knowingly and feloniously filling illegal orders for narcotics.

(Ab. of Rec., p.p. 45-46, pgh. XIII, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 62, pgh. V, F. 55.)

XIV.

The Court erred in announcing the following ruling in the presence of the jury, to the prejudice of the defendant, to-wit: "That the law laid down by the Supreme Court of the United States in the cases of the U. S. vs. Webb and U. S. vs. Moy was the law of this case and that the law of these two cases would be applied to the facts in this case."

(Ab. of Rec., p. 46, pgh. XIV, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 63, pgh. VII, F. 56.)

XV. L

The Court erred in overruling defendant's motion for a new trial for the reason that the evidence of George Warner, named in the count upon which the defendant was found guilty, was found by the Court to be perjured evidence.

(Ab. of Rec., p. 46, pgh. XV, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 64, pgh. IX, F. 56.)

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## ARGUMENT
## ASSIGNMENT NO. 1

This assignment of error is based upon the error of the trial Court in overruling the defendant's demurrer to the prescriptions seized by the United States narcotic agent without due process of law, in violation of Article IV of the Constitution of the United States, which said prescriptions were used by the United States District Attorney before the Grand Jury.

(Ab. of Rec., p. 41, pgh. I, F. 36.)

Ab. of Rec., p. 18, F. 18.)

This assignment or error does not appear in the bill of exceptions of the plaintiff in error, but we have taken it for granted that it refers to the motion to suppress certain evidence. (Ab. of Rec., p. 18), which motion was supported by the affidavit of the defendant, R. A. Aiton, (Ab. of Rec., p. 19, F. 14) which we quote, herewith, as follows: "R. A. Aiton, being first duly sworn, deposes and says: That he is the defendant in cause No. C.—1462, (Phoenix), which is the United States of America vs. R. A. Aiton; that prior to and at the time of this indictment this defendant was the duly licensed and practicing physician within the State of Ari-

zona and duly registered with the Collector of Internal Revenue for the State of Arizona, as a physician under the provisions of the Act of Congress of December 17th, 1914, as amended; that ever since the findings of said indictment this defendant has been, and now is, a duly licensed physician under and by virtue of the laws of the State of Arizona, and residing in Phoenix, Arizona; that affiant is informed and verily believes and upon such information and belief, says, that the United States District Attorney or certain officers of the United States of America, to him unknown, seized the sealed package in which certain prescriptions written by this defendant, were, and affiant says that said prescriptions are the identical prescriptions mentioned in the indictment aforesaid; that said prescriptions were taken by the aforesaid officers or officer from the druggist and out of the store of the druggist who filled said prescriptions and returned and sealed said prescriptions as provided by law; that said prescriptions were seized and are held by and at the instance of the United States of America and to the prejudice of this defendant because said prescriptions are of great value to this defendant and if introduced in evidence in the trial of the cause now pending will seriously prejudice this defendant and will in fact compel the defendant to give evidence against himself; that affiant is informed and believes that the Government of the United States in the prosecution of this case intends to use or attempt to use

said written prescriptions seized and held, as aforesaid; that the seizure and detention of said prescriptions by the United States Government and its officers was and is unlawful and in violation of the constitutional rights of this defendant and prejudicial to his interests.

(Signed) R. A. AITON.

Subscribed and sworn to before me this 30th day of October, 1923.

WELDON J. BAILEY,
Notary Public.

(Notarial Seal)

My commission expires Sept. 1, 1924."

So far as the record discloses, there is no denial by any witness for the Government of the facts stated in the affidavit of the defendant above referred to, as to the seizure of certain prescriptions written by him. Such papers could not be legally seized without a warrant, and not then, except upon probable cause supported by oath or affirmation.

Article IV of the Constitution of the United States provides that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The plaintiff in error feels that the seizure of the prescriptions in the manner set forth in his affidavit was without due process of law and in violation of his constitutional rights.

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## ASSIGNMENT NO. II.

This assignment of error is based upon the error of the trial Court in overruling defendant's motion to suppress evidence in the form of prescriptions which were seized in an illegal manner by the United States narcotic agent and used before the Grand Jury by the United States Attorney in violation of Article V of the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself.

(Ab. of Rec., p.p. 41-42, pgh. II.)

(Ab. of Rec., p.p. 18, 19, 20, 21.)

Article V of the Constitution of the United States provides, among other things, that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The plaintiff in error respectfully contends that his motion to suppress these prescriptions as evidence should have been granted, and that the order of Court denying the motion violated his constitu-

tional rights.

(See Ab. of Rec., p.p. 21-22.)

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## ASSIGNMENT NO. III.

This assignment is based upon the error of the trial Court in admitting in evidence the prescriptions seized by the United States narcotic agent in an illegal manner, as hereinbefore set forth in Assignments I and II, whereby the constitutional rights of the defendant were violated.

(Ab. of Rec., p. 42, pgh. III, F. 37.)

(Bill of Exceptions, See Ab. of Rec., p. 59-60.)

The arguments advanced in support of Assignments I and II are equally applicable to this Assignment and we respectfully request that same be considered in connection with this assignment without the necessity of repetition.

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## ASSIGNMENT NO. IV.

This assignment is based upon the error of the Court in admitting incompetent evidence in the nature of prescriptions, against the defendant, to the prejudice of his substantial rights, and in violation of his constitutional rights. These prescriptions are the identical prescriptions referred to in the affidavit of the plaintiff in error, in Assignment

No. I. The use of these prescriptions after their illegal and unwarranted seizure as hereinbefore set forth, and the introduction of them in evidence against the defendant, had the effect of compelling him to testify against himself, and was in violation of the provisions of Article V of the Constitution of the United States.

The arguments in support of the previous assignments applies to this assignment, and we respectfully request that same be considered without the necessity of repetition.

In connection with Assignments I, II, III and IV, we direct the attention of the Court to the comparatively recent case of Silverthorne Lumber Company vs. U. S., 251 U. S. 385 (64 L. Ed. 319), involving the question of the right of search and seizure, wherein it was held: "That the rights of a corporation are to be protected against unlawful search and seizures even if the same result might have been achieved in a lawful way—that is, by an order for the production of the books."

So, in the case at bar, while perhaps the prescriptions in question might have been legally seized had proper process been issued for that purpose, yet, to seize them in the manner they were seized, and the use of them in evidence against the defendant was illegal and in violation of his constitutional rights, although they would have been properly admissible in evidence if they came into the possession of the

United States authorities in a legal manner.

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## ASSIGNMENT NO. V.

This assignment is based upon the error of the Court in admitting incompetent, immaterial, irrelevant and illegal evidence against the defendant, in the nature of prescriptions bearing date two months after the indictment under which the defendant was tried; the same being admitted to show the intent of defendant in the commission of the acts set forth in the indictment.

(Ab. of Rec., p.p. 42-43, pgh. V, F. 37.)
(See Bill of Exceptions, Ab. of Rec., p.p. 59-60.)

The admission of this evidence was highly prejudicial to the defendant, and that it conduced in a very large measure to his conviction there can it seems to us, be little doubt.

It was incompetent, immaterial and irrevelant for any purpose whatsoever, particularly in view of the fact that intent is not an essential ingredient in this class of offenses.

If the plaintiff in error violated the provisions of the Act in question by the illegal issuance of prescriptions, or otherwise, he was guilty regardless of the intent, or intention, with which those acts were committed

Furthermore, whether or not he issued prescriptions for centain narcotic drugs either before or after the issuance of the prescriptions as charged in the indictment, was wholly immaterial. If they tended to prove anything at all it was the commission of other offenses; to show that the plaintiff in error was making a wholesale business of the issuance of prescriptions for narcotic drugs—which the evidence in support of the allegations of the indictment did not show—and it may reasonably be inferred that the defendant was prejudiced in the eyes of the jury, and that their verdict of guilty on the first count was largely influenced thereby.

O'Connell vs. U. S. 64 L. Ed. 827.

Abrams vs. U. S. 250 U. S.. 616 (63 L. Ed. 1173).

U. S. vs. Doremus, 63 L. Ed. 493.

U. S. vs. Comyns, 248 U. S. 349 (63 L. Ed. 287).

## ASSIGNMENT NO. VI.

This assignment is based upon the error of the Court in admitting incompetent, immaterial, irrevelant and illegal evidence against the defendant, in the nature of prescriptions dated two months after the indictment under which defendant was tried, for the purpose of contradicting evidence introduced on the issues raised on the indictment.

(Ab. of Rec. p. 43, pgh. VI, F. 37.)

(See Bill of Exceptions, Ab. of Rec. p. 60, pgh. I).

The record in this case not being preserved as it would have been had there been a reporter's transcript, we are unable to state even the substance of this evidence, and, therefore, we are not in a position to decide definitely what weight it might have had with the jury, or to what extent it may have influenced their verdict. But it is not, and cannot be, denied that prescriptions issued from one to two months subsequent to the date of the arrest of the defendant on the charges contained in the indictment, were introduced by the Government upon the theory that they would rebut the defendant's testimony to the effect that he refrained from writing any more prescriptions when he was informed that he had been violating the law.

Whether or not he issued such prescriptions was wholly immaterial and irrevelant, and had absolutely no bearing on this case, nor on the question of his guilt, or innocence, of the charges in the indictment. But, the Government introduces it nevertheless, over the objections of defendant's counsel, in their apparent zeal to secure a conviction at all haards. Again, the question of intent, and whether or not willful violations of the Harrison Narcotic Drug Act were being committed by the

plaintiff in error, comes to light, when it could not possibly have any bearing on the defendant's case, or serve any othe rpurpose than to show a continuation of certain acts—the issuance of prescriptions for narcotic drugs—claimed by the government agents to be unlawful, and to show, thereby, that the plaintiff in error was engaged in the wholesale business of issuing such prescriptions and that he did not cease his operations in that line even after he had been warned by them, as had already been pointed out in previous assignments.

That it had the precise effect the United States Attorney calculated it should have, and intended it should have, there can be but little doubt, for it apparently had the effect of bolstering up an otherwise extremely weak case, and led to the conviction of the plaintiff in error on the first count of the indictment.

When prosecutions were first instituted under the provisions of the Harrison Narcotic Drug Act, the question of constitutionality of the act was raised in different Federal Courts, and demurrers to indictment were sustained upon the ground of the unconstitutionality of the act, until the decision of the United States Supreme Court in the Doremus case, wherein the constitutionality of the act was upheld.

U. S. vs. Doremus, 65 L. Ed. 493.

The question of the necessary everments in

an indictment from a violation of this Act; what is necessary by way of evidence to support the material allegations of the indictment, and what is competent, legal evidence against the accused, as well as the procedure in general in this class of cases, has been definitely settled in different cases, and the rules clearly stated by the Federal Courts from the Circuit Court of Appeal up to the United States Supreme Court.

U. S. vs. Doremus, 63 L. Ed. 493.

U. S. vs. Friedman, 224 Fed. 276.

O'Connell vs. U. S., 64 L. Ed. 827.

Abrams vs. U. S., 250 U. S. 616.

U. S. vs. Comyns, 248 U. S. 349 (63 L. Ed. 287).

Web vs. U. S., 249 U. S. 86 (63 L. Ed. 497).

U. S. vs. Behrman, 66 L. Ed. 619.

U. S. vs. Jin Fuey Moy, 241 U. S. 394 (60 L. Ed. 1016).

## ASSIGNMENT NO. VII.

This assignment is base dupon the error of the learned trial judge, presiding at the trial of this case, in framing questions for the United States District Attorney to propound to witnesses for the defendant, after objections to the original ques-

tions had been sustained by the Court.

(Ab. of Rec. p. 43, pgh. VII, F. 38).

(See Bill of Exceptions, Ab. of Rec. p. 60, pgh. II).

Due to the fact that there is no reporter's transcript available, we are in utter darkness as to the nature of the questions propounded by the United States Attorney, objections to which were sustained by the Court, as shown by the Bill of Exceptions, nor is there anything in the record which will throw any light upon the subject of the questions propounded by the learned trial judge, and which were evidently answered over the objections of counsel for plaintiff in error. Therefore, with nothing more in support of our position than the assignment of error and the Bill of Exceptions upon this point, we are averse to making the positive statement that the substantial rights of the defendant were prejudiced by such questions and the answers thereto. But we do contend that the record itself shows that the substantial rights of the plaintiff in error were prejudiced in other respects, resulting in his illegal conviction, as pointed out in previous assignments of error and as will be shown in future assignments.

## ASSIGNMENT NO. VIII.

This assignment is based upon the error of the trial Court in refusing to admit material evidence

offered by the defendant, of the establishment of a so-called clinic, under which he issued the prescriptions in question.

(Ab. of Rec. p. 43, pgh. VIII, F. 38).

See Bill of Exceptions, Ab. of Rec. p. 61, pgh. III, F. 54).

The record discloses that the plaintiff in error offered to prove by Dr. Carson and other witnesses that, after having held a conference to consider the best method of regulating and controlling the use of narcotic drugs in the City of Phoenix, they concluded that the known addicts should be referred to one doctor and kept under his care and treatment. This evidence was offered for the purpose of showing the good faith of Doctor Aiton, the plaintiff in error, in the issuance of the prescriptions to George Warner, and the other persons named in the indictment, and his lack of criminal intent, or any intention to violate any law whatsoever.

The plaintiff in error further offered to show that F. P. Barnes, a local narcotic agent during the period within which the prescriptions were issued, directed many drug addicts to plaintiff in error and requested him to treat such persons and to prescribe narcotics for them, and that, pursuant to such requests, he did write a number of prescriptions for narcotic drugs, and that those were the

prescriptions offered in evidence by the Government.

It is true that it is not incumbent upon the Government to offer evidence tending to show any specfiic intent, or intention, to violate the law in cases arising under the Harrison Narcotic Drug Act, in order to warrant the jury in returning a verdict of guilty, but it should be borne in mind that, in the case at bar, the very theory upon which the Government officers were proceeding was that the defendant issued the prescriptions in question for larger amounts of the inhibited narcotic drugs than the particular patient's case warranted; that the plaintiff in error "unlawfully, wilfully, knowingly and feloniously" issued such prescriptions "with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of George Warner for such drug", and, furthermore, that he continued such illegal operations after having been warned by certain Government officials.

That the Government prosecutor offered testimony in support of those allegations of the indictment (which he deemed material averments) there can be no question.

We will grant that certain of those averments were not necessary in order that the indictment should contain a statement of facts sufficient to constitute a public offense—that they were surplus-

age. However, having so framed the indictment, and having offered testimony in support of such alllegations, it was erroneous for the learned trial judge to exclude evidence offered by the defendant in explanation of his reasons for the issuance of those prescriptions, to show his good faith and absence of criminal intent, and to rebut the evidence introduced by the Government upon those points.

The effect of the testimony offered by the Government, and which the plaintiff in error was denied the right to rebut, was to prove beyond a reasonable doubt that the defendant was issuing prescriptions for narcotic drugs by the wholesale; that he did so wilfully, knowing that he was violating the provisions of the Harrison Narcotic Act; that such acts on the part of the defendant were flagrant and that he did not desist, although repeatedly warned by certain Government officials to do so. What instructions the Court gave, if any, upon these points, we cannot say, but, instructions or no instructions, we do know from our common knowledge and understanding of matters of this kind that evidence of such acts by the defendant, unexplained by him, would tend to lead the jury to believe that he wilfully and knowingly violated the law; that he was, perhaps, a man of criminal tendencies instead of a peaceful, law-abiding citizen, and that, therefore, they should return a verdict of guilty against him. This class of evidence had the precise effect that the United States Attorney evidently calculated it should have—that Dr. Aiton

had flagrantly violated the law, and without such highly prejudicial testimony, a conviction could scarcely have been expected; on the contrary, it may very reasonably be inferred that in the absence of such testimony the plaintiff in error would have been acquitted.

The United States Attorney may object to this line of reasoning and to the conclusions which we have reached from what we understand to be the facts in this case.

However, it is undisputed, and indisputable, that the plaintiff in error was convicted on the first count in the indictment—the George Warner count. It is significant that while one count (the eighth) in the indictment alleges the issuance of a prescription for a much larger amount than in the George Warner case, yet, the defendant was acquitted on that count. Therefore, it cannot be logically reasoned that the defendant was convicted because the jury believed he issued the George Warner prescription for an unusual or unreasonable amount of the inhibited narcotic drug, simply to cater to, and satisfy the cravings of, Warner; consequently, we must seek for some other reason for his conviction, and we are irresistibly drawn to the conclusion that Dr. Aiton was convicted on "general principles", if we may be pardoned for the use of that term, by the use of which is meant that, while a particular defendant has not been shown to be guilty of any real violation of any law, yet, from the evidence

submitted—which has no real bearing upon the question of the guilt or innocence of that defendant of the charge in the indictment—and which should not have been permitted to be introduced, at least without giving the defendant an opportunity to rebut it, the jury reaches the conclusion that the defendant should be convicted "on general principles".

We contend that for the error of the learned trial judge in excluding this evidence, this case should be reversed.

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## ASSIGNMENT NO. IX.

This assignment is based upon the error of the Court in refusing to permit a witness for the plaintiff in error to testify to certain material facts, to-wit: The establishment of a so-called clinic, created for the purpose of passing upon the cases of certain drug addicts who were suffering from chronic or incurable diseases.

(Ab. of Rec., p.p. 43-44, pgh. IX, F. 38.)

(See Bill of Exceptions, Ab. of Rec., p. 61, pgh. III, F. 54.)

While Assignments VIII and IX were treated as separate assignments in the petition for a writ of error, they might very properly have been grouped as was done in the bill of exceptions.

We have quite fully covered this assignment in the argument upon Assignment VIII, which we respectfully request the Court to consider without the necessity for repetition. We desire to add, however, that, as shown in paragraph three of the bill of exceptions, and paragraph four, as well, this evidence was offered for the purpose of showing the good faith of Dr. Aiton in issuing the prescriptions in question, and, while perhaps not material or relevant in the first instance, was unquestionably material and relevant after the introduction of certain evidence by the Government tending to show bad faith, guilty knowledge and a criminal intent, or intention.

Without such illegal evidence on behalf of the Government, it is extremely doubtful if the jury would have returned a verdict of guilty, even on the first count of the indictment. To exclude the evidence offered by the defendant, constitutes reversible error.

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## ASSIGNMENT NO. X.

This assignment is based upon the error of the Court in refusing to give the following instruction requested by the plaintiff in error:

"You are instructed that a reputable physician duly in charge of bona fide patients suffering from diseases known to be incurable, such as cancer, ad-

vanced tuberculosis and many other diseases, may in the course of his professional practice and strictly for legitimate medical purposes, dispense or prescribe narcotics for such diseases, providing the patients are personally attended by the physician, that he regulates the dosage and that he prescribe no quantity greater than that usually given by members of his profession and known to be sufficient for the purpose. You are further instructed that if you find upon all the facts as stated, you must find him not guilty of a violation of the Harrison Narcotic Act.

(Ab. of Rec., p. 44, pgh. X, F. 39.)
See Bill of Exceptions, Ab. of Rec., p.p. 63-64, F. 56.)

It has been held that a physician who issues a prescription for an unusually large amount of narcotic drugs and which prescription shows on its face is unreasonable and unusual, may be found guilty of an offense under the law (Harrison Narcotic Act) unless the prescription indicates the necessity therefor.

U. S. vs. Curtis, 229 Fed. 288.

Upon the authority of the Curtis case just cited, as well as the other Federal cases hereinbefore cited, this was a perfectly proper instruction, and, in view of the allegations of the indictment, the testimony offered by the Government, and allowed to

be introduced by the Court in support thereof, and the case made out by the Government in general, it should have been given.

The failure of the Court to give this instruction, in view of all the circumstances, constitutes reversible error.

Had the defendant been permitted to do so, he might have shown by credible witnesses the usual amount of a certain narcotic drug that should be administered, and what would be a reasonable quantity for a prescription to contain in cases similar to George Warner, in order that the jury might determine whether a prescription for an unusual, or unreasonable, amount had been issued in the Warner case, but the plaintiff in error was prevented by the rulings of the trial Court from so doing.

Whether or not the prescriptions showed the necessity for the administration of the narcotic drug, the testimony of the witnesses which was ruled out would have shown the issuance of such prescriptions in the course of the professional practice of the plaintiff in error, and the issuance of them, in good faith, to meet the urgent needs of his patients, and the necessity for their issuance. Had this instruction been given, it is not unreasonable to assume that the defendant would have been acquitted.

And, in passing, we respectfully direct the atten-

tion of the Court to the fact that in all of the cases hereinbefore referred to wherein convictions of violations of the Harrison Narcotic Drug Act have been upheld by the courts of last resort (notably the Webb case and the Jin Fuey Moy case), the record discloses that the defendants were engaged in the wholesale business of issuing prescriptions for the inhibited narcotic drugs, and that such prescriptions called for amounts running into the hundreds of grains. And, in some of the leading cases there was not only shown to be a conspiracy between a certain dotcor and a certain druggist to violate the narcotic act, but an actual consummation of such conspiracy by means of orders, prescriptions and sales of narcotic drugs. We contend, therefore, that the case at bar should be distinguished from these other cases, not only by reason of the fact that the indictment is couched in different language, and consequently charges a different offense (if any offense is charged at all), but because the amounts called for in the prescriptions were unusually large, and the evidence unquestionably showed that the indicted persons were doing a wholesale business in the handling of narcotic drugs, and were not engaged in the legitimate profession of the practice of medicine, and the issuance of prescriptions in the pursuance of such practice.

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## ASSIGNMENT NO. XI.

This assignment is based upon the error of the

Court in excluding evidence offered by the defendant to show that a clinic had been created under the supervision of the Collector of Internal Revenue for the District of Arizona, and that certain officials formed such clinic for the purpose of treating habitual users of morphine, and who were suffering from some chronic or incurable disease.

In view of the indictment charging a felonious intent and purpose to dispense, distribute, barter and sell certain narcotic drugs, and the evidence introduced by the Government in support of such allegations, the evidence offered by the defendant was unquestionably relevant and material and should have been admitted.

(Ab. of Rec., p.p. 44-45, pgh. XI, F. 39.)
(See Bill of Exceptions, Ab. of Rec., p.p. 62-63, pghs. V and VI, F. 55.)

Again, the case of the plaintiff in error must be differentiated from the adjudicated narcotic cases hereinbefore referred to. In those cases the record does not disclose that the doctor under indictment took up with any narcotic officer the matter of the issuance of prescriptions for narcotic drugs, nor did any narcotic officer put his stamp of approval or his "O. K." on such prescriptions. But, in the case at bar, Doctor Aiton offered to show that he followed just that procedure, and that the issuance of the prescriptions in question in the manner they were issued; to the persons to whom they were

issued and the amounts for which they were issued, had the endorsement of the Government narcotic agent. That evidence, if allowed to go to the jury, coupled with the instruction referred to in the previous assignment, or any other instruction upon that point, would have entirely changed the aspect of this case in the eyes of the jury and would quite likely have resulted in an acquittal of the defendant in error instead of his conviction.

This error alone should, it seems to us, be sufficient to warrant a reversal of this case.

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## ASSIGNMENT NO. XII.

This assignment is based upon the error of the Court in ruling, as a matter of law, that all evidenc as to what narcotic agents said, or what they did, at the time prescriptions were inspected after their issuance, was immaterial, and that such evidence was inadmissible to show the intent of the defendant in issuing them.

(Ab. of Rec., p. 45, pgh. XII, F. 39.)

(See Bill of Exceptions, Ab. of Rec., p.p. 62-63, pghs. V and VI, F. 55.)

In view of the allegations as to the unlawful and willful issuance of the prescriptions by the defendant, with the intent and purpose on his part to dispense, distribute, barter and sell the narcotic drugs

mentioned, not in the course of his professional practice only, but on the contrary, to cater to and satisfy the cravings of the persons named, which allegations are the basis of the indictment in this case, and the evidence introduced by the Government in support thereof, the evidence offered by the plaintiff in error was competent and material, and for the Court to exclude it was highly prejudicial to his ease. This question has been quite thoroughly gone into in assignment eleven, and inasmuch as the argument advanced in support of that assignment is equally applicable to this assignment, we respectfully request that it be so considered.

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## ASSIGNMENT NO. XIII.

This assignment is based upon the error of the Court in ruling, as a matter of law, that the wrappers placed on the bundles of prescriptions inspected by the narcotic agents, and which were offered in connection with the prescriptions for the purpose of showing the good faith of the defendant, were inadmissible.

(Ab. of Rec., p.p. 45-46, pgh. XIII, F. 40.)

(See Bill of Exceptions, Ab. of Rec., p. 62, pgh. oV, F. 55.)

This assignment is covered by the argument upon Assignments XI and XII, and we deem a repetition unnecessary.

## ASSIGNMENT NO. XIV.

This assignment is based upon the error of the Court in announcing in the presence of the jury, during the trial of this case, that the rule laid down by the Supreme Court of the United States in the cases of U. S. vs. Webb, and U. S. vs. Moy was the law of this case and that the law as laid down in those two cases would be applied to the facts in this case.

(Ab. of Rec., p. 46, pgh. XIV, F. 40.)

See Bill of Exceptions, Ab. of Rec., p. 63, pgh. VIII, F. 56.)

As shown by the bill of exceptions, this statement was made by the Court before all the facts were before the Court and at a time when it was impossible for the trial Court to know what the facts in this case were, which ruling prejudiced the jury against the defendant.

In the absence of a complete reporter's transcript of the record and proceedings, it is utterly impossible for counsel to state, with any degree of certaintl, just what effect, if any, this statement had on the minds of the trial jurors, or to what extent, if at all, they were influenced by it to the prejudice of the defendant.

While the rule, or rules, of law laid down by the United States Supreme Court in the Webb case, the

Jin Fuey Moy case, or any other case wherein the facts were similar to those in the present case, would unquestionably be applicable to this case and binding upon the trial Court, yet, even a casual examination and analysis of the case of Webb vs. U. S. (249 U. S. 86, 63 L. Ed. 497) and the case of Jin Fuey Moy vs. U. S. (241 U. S. 394, 60 L. Ed. 1016) will disclose the fact that there is a vast distinction between those cases and the case at bar in many, if not all, of the essential elements.

The Webb case was before the United States Supreme Court on a certificate from the United States Court of Appeals for the Sixth Circuit, presenting the question whether retail sales of morphine by druggists to persons without a physician's prescription or order blank are forbidden by the Harrison Narcotic Drug Act; and the question whether, if the act is construed to prohibit such sales, it is unconstitutional, and the question whether certain orders of physicians amounted to prescriptions.

The first question was answered in the affirmative and the second question, as well as the third, were answered in the negative. We quote from the opinion of Mr. Justice Day, as follows: "This case involves the provisions of the Harrison Narcotic Drug Act, considered in No. 367, just decided (249 U. S. 86, ante, 493, 39 Sup. Ct. Rep. 214). "The case comes here upon a certificate from the Circuit Court of Appeals for the Sixth Circuit."

"From the certificate it appears that Webb and Goldbaum were convicted and sentenced in the District Court of the United States for the western district of Tennessee on a charge of conspiracy (Penal Code, Sec. 37 (36 Stat. at L. 1096, chap. 321, Comp. Stat. 1916, Sec. 10,171) to violate the Harrison Narcotic Law, December 17, 1914, 38 Stat. at L. 785, chap. 1, Comp. Stat. 1916, Sec. 6287 g.

"While the certificate states that the indictment is inartificial, it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks (Sec. 1 of the act) for a prohibited purpose.

"The certificate states: 'If Sec. 2, rightly construed, forbids sales to a nonregisterable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are "prescriptions" within the meaning of exception (b) in Section 2.'

"We conclude that the case cannot be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the facts as follows—assuming, as for this purpose we must do, that whatever the evidence tended to show, in aid of the prosecution, must be taken as a fact: 'Webb was a practicing physician and Gold-

baum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users, upon their application to him therefor. He furnished these "prescriptions" not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit, or as might be necessary or helpful in an attempt to break the habit, but with such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions.

Webb was duly registered and paid the special tax as required by Section 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by section 2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine which he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions.

It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum, and without any physi-

cian's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers in Memphis thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and that he sold narcotic drugs in 6,500 instances; that Webb regularly charged 50 cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over four thousand such prescriptions; and that one Rabens, a user of the drug, came from another state and applied to Webb for morphine, and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Raben's presentation, although each was made out in a separate and fictitious name.'

"Upon these facts the Circuit Court of Appeals propounds to this court three questions:

1. "Does the first sentence of section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, and who have no order blank therefor, and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued?"

2. "If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?"

3. "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under the exception (b) of section 2?"

"If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial."

BY THE COURT: "What we have said of the construction and purpose of the act in No. 367 plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367. As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

The manifest injustice done to Doctor Aiton, the

plaintiff in error, by the application to his case of the rule laid down in the Webb case is apparent at a glance. The indictment in that case differs from the one in the present case in that it charged a conspiracy between a doctor (Webb) and a druggist (Goldbaum) to violate the Harrison Narcotic Law, while in the case at bar the indictment charges, in substance, that the defendant "did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the act of Congress aforesaid, issue, and write and deliever a prescription to one George Warner for a quantity of morphine sulphate, to-wit: fifty-six grains of morphine sulphate, not in good faith for meeting the needs of the said George Warner, not to effect a cure of the said George Warner in the course of his professional practice only, the said George Warner being then and there an habitual user of and addicted to the use of such narcotic drugs, nor to treat the said George Warner then and there suffering from an incurable or chronic disease in the course of his professional practice only, but, on the contrary, with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs for the purpose of catering to and satisfying the cravings of said George Warner for such drug."

There is not only a vast distinction between the indictment in the Webb case and that in the present case, but the facts are widely different. There is no evidence in the case at bar of any agreement, or understanding, between the plaintiff in error and

any druggist, that they should do certain acts which, in themselves, constituted a violation of law.

There is no evidence in the present case of the issuance of a large number of prescriptions—running into the thousands within the period of a few months—for large amounts—an ounce, or more, at a time—or for any other unusual or unreasonable amount of the inhibited drugs. On the contrary, the indictment in the case at bar shows that but one prescription was issued to each person, and the amount called for could scarcely be called unusual, or unreasonable, especially in the George Warner case—the only count in the indictment upon which the plaintiff in error was convicted.

In the Webb case the prescriptions were made out in the names of fictitious persons in several instances, while in the present case the true name was given in each instance.

It is undisputed, and indisputable, that Doctor Aiton did everything openly, and above-board. He issued the prescriptions in the course of his professional practice as a physician, evidently in amounts sufficient only to meet the needs of bona fide patients, and instead of evincing any desire to defy, or evade, the Harrison Narcotic Drug Act, by means of a conspiracy, or otherwise, he acted in good faith, issuing the prescriptions after the submission of the cases to the clinic, and that such practice had the approval of the United States Narcotic officers.

All these things the plaintiff in error offered to prove, but he was prevented from doing so by the Court, upon the objections of the Government, notwithstanding the fact that the United States officials in prosecuting this case were proceeding upon the theory that the case at bar was at least analagous to the Webb and Jin Fuey Moy cases, and we believe we have the right to assume they introduced evidence tending, at least, to support that theory, and then, when the defendant offers evidence to rebut the illegal evidence thus introducd, he is denied that right.

The Jin Fuey Moy case (254 U. S. 189, 65 L. Ed. 214) was before the United States Supreme Court upon a writ of error. The plaintiff in error (Jin Fuey Moy) was indicted and convicted for a violation of Section 2 of the Act of Congress approved December 17, 1914, commonly known as the Harrison Antinarcotic Act.

He filed a motion in arrest of judgment which was overruled by the trial Court and the case was taken directly to the Supreme Court upon a writ of error, upon the ground of the unconstitutionality of the act.

It appears that the plaintiff in error was indicted by an indictment containing twenty counts, differing only in matters of detail. He was convicted upon eight counts and acquitted upon the others. The indictment charged, in substance, "that on the

.....day of ....., in the County of Allegheny, in the Western District of Pennsylvania, the defendant was a practicing physician and did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away, certain derivatives and salts of opium, to-wit, a specified quantity of morphine sulphate, to a person named, not in the pursuance of a written order from such person on a form issued in blank for that purpose by the Commissioner of Internal Revenue, under the provisions of Section 2 of the act, in that said Jin Fuey Moy, at the time and place, aforesaid, did issue and dispense to the person named a certain prescription; that said person was not a patient of the said Jin Fuey Moy, and that the said morphine sulphate was dispensed and distributed by said Jin Fuey Moy not in the course of his professional practice only, contrary to the Act of Congress * * * ."

The case at bar should be distinguished from the Jin Fuey Moy case in several important particulars.

In the first place, Jin Fuey Moy was indicted for the offense of selling, bartering, exchanging and giving away certain derivatives and salts of opium —morphine sulphate—in that he did issue and dispense a prescription, etc. In other words, Jin Fuey Moy was charged with a direct sale, whereas, in the present case, the plaintiff in error is charged with the issuance and delivery of a prescription (in the George Warner count) for fifty-six grains of

morphine sulphate, * * * with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs * * *, only; which allegations are not sufficient to charge a public offense, under the provisions of the Federal Penal Code pertaining to indictments, or any of the leading Federal cases which have reached the appellate courts, in general, or of any of the adjudicated cases arising under the Harrison Narcotic Act, in particular. But, this phase of the case will be more fully discussed in a later assignment, touching upon the question of the sufficiency of the indictment.

The point we desire to bring out at this time is this: The trial Court, in the case at bar, should have differentiated between the Jin Fuey Moy case and this case, and not used it as a precedent for the guidance of the United States Attorney, or for the jury to follow, because if there was any analogy whatsoever as to all the essential elements, that it had no bearing on the present case, and reference to it in the presence of the jury, and the use of it by the prosecuting attorney as a precedent, could scarcely serve any other purpose than to confuse the jury as to the true issues involved in the case they were trying, to the prejudice of the defendant.

It will be observed in the Jin Fuey Moy case that it was held that: 'The exceptions from the provisions of the Harrison Antinarcotic Act of December 17, 1914, Section 2, against the sales of opium derivatives to persons not having a written order in

official form which that section makes in favor of registered physicians dispensing or distributing any such drug to patients in the course of their professional practice only, and of the sale, dispensing or distributing of the drugs by a dealer upon prescriptions issued by a registered physician, must be deemed to confine the immunity of a registered physician in dispensing the drugs mentioned strictly within the appropriate bounds of a physician's professional practice and not to protect a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the cravings of one addicted to the use of the drug."

It was also held in the case just cited that: "A physician may be found guilty under the Harrison Narcotic Act of December 17, 1914, of participating as a principal in the prohibited sale of an opium derivative belonging to any other person where he unlawfully issues a prescription therefor to the would-be purchaser, in view of the provisions of section 2 of that act, making it unlawful for any person to sell, barter, exchange or give away any such drug except in pursuance of a written order, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, with exceptions in favor of registered physicians dispensing or distributing any such drug to patients in the course of their professional practice only, and of the sale, dispensing or distributing of the drugs by a dealer upon prescriptions issued by registered physicians."

It will be observed that while the judgment of the trial Court based upon the verdict of the jury convicting Webb and Goldbaum, was affirmed by the appellate courts, nevertheless, the Chief Justice dissented and Mr. Justice McKenna, Mr. Justice Van Deventer, and Mr. Justice McReynolds concurred in the dissent.

However, the constitutionality of the Act in question was upheld, and, therefore, we are not concerned with that question in the present case. But, we do contend that outside of the question of the constitutionality of the act, the trial Court erred in using the Webb case as a precedent for rulings on questions of law in the case at bar, when the indictments, and the facts in support of them, were so widely at variance in the two cases, for the reasons already stated.

We desire to call the attention of the Court to the case of the United States vs. Doremus, 249 U. S. 86 (63 L. Ed. 493). While this case was not used as a precedent in the trial of the case at bar, we quote from it in order that a distinction may be drawn between that case and the present one. Mr. Justice Day delivered the opinion of the court, which, in part, is as follows:

"Doremus was indicted for violating Section 2 of the so-called Harrison Narcotic Act of December 17, 1914. Upon demurrer to the indictment the District Court held the section unconstitutional for

the reason that it was not a revenue measure, and was an invasion of the police power reserved to the states * * *. There are ten counts in the indictment. The first two treated by the court below as sufficient to raise the constitutional question decided. The first count in substance charges that: "Doremus, a physician, duly registered, * * * did unlawfully, fraudulently and knowingly sell and give away and distribute to one Ameris a certain quantity of heroin, to-wit, five hundred one-sixth grain tablets of heroin, a derivative of opium, the sale not being in pursuance of a written order on a form issued on the blank furnished for that purpose by the Commissioner of Internal Revenue."

"The second count charges in substance that: Doremus did unlawfully, and knowingly sell, dispense, and distribute to one Ameris five hundred one-sixth grain tablets of heroin not in the course of the regular professional practice of Doremus, and not for the treatment of any disease from which Ameris was suffering, but, as was well known by Doremus, Ameris was addicted to the use of the drug as a habit, being a person known as a "dope fiend", and that Doremus did sell, dispense, and distribute the drug heroin to Ameris for the purpose of gratifying his appetite for the drug as an habitual user thereof."

After quoting the provisions of Sections 1 and 2 of the Harrison Narcotic Act, in part, the Court says:

"It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

The Court further says: "It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the Commissioner of Internal Revenue, and the order is required to be preserved for two years in such a way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of professional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc., registered under the act."

The judgment of the District Court dismissing the case upon the demurrer to the indictment was reversed by the Supreme Court, thereby upholding the constitutionality of the Act. The Chief Justice dissented, and the dissent was concurred in by Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds.

But, we reiterate, the question of the constitutionality of the act does not concern us in the present case.

We simply cite this (Doremus) case to show the distinction between it and the case at bar. The rule of law is very clearly defined, then, conversely, it would be lawful for a person to obtain the inhibited drugs by means of the order provided for for the purpose of a sale or distribution of the same in the conduct of a lawful business in the drugs, or the legitimate practice by a physician of his profession. It also follows that sales of these drugs are lawful to persons who have the required order forms and the order is preserved for official inspection. Nor does the inhibition against the sale, dispensing or distributing of the drugs apply to physicians * * * dispensing and distributing the drugs in the course of professional practice to patients, provided the physician keeps a record, except in the case of personal attendance upon a patient. Neither does it apply to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription by a physician * * * registered under the act.

Applying the converse of the rule, as above stated, to the case at bar, the question naturally arises: In what respect did Doctor Aiton violate any of the provisions of the Harrison Act? Far from any violation of the act in question, according to the rule of law laid down in these adjudicated cases, the record in the present case shows conclusively, so it appears to us, that the plaintiff in error, at all times mentioned in the indictment, kept himself well within the spirit, as well as the letter, of the Act, according to the interpretation

of the different provisions in the cases cited, and was within his legal rights in the issuance of the prescriptions which are the foundation of the indictment upon which he was convicted.

In this connection, we desire to direct the attention of the Court to the case of the United States vs. Behrman, wherein it was held that: "Section 2 * * * does not protect a physician who has issued to one known by him to to be a drug addict, threee so-called prescriptions for 150 grains of heroin, 360 grains of morphine and 210 grains of cocaine."

U. S. vs. Behrman, 258 U. S. 289 (66 L. Ed. 619).

Thus it will be seen, that in the Berhman case, as well as all the others previously cited, the indictment not only charged, but the testimony evidently sustained the allegations of sales of different kinds of narcotic drugs, under so-called prescriptions, calling for amounts that were unusual, unreasonable, and, perhaps, not in the course of the professional practice of the physician in question to bona fide patients, but, on the contrary that he was making a wholesale business of the traffic in those drugs. These conditions and circumstances, we submit, are not present in the case of the plaintiff in error.

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## ASSIGNMENT NO. XV

This asignment is based upon the error of the

trial court in overruling defendant's motion for a new trial for the reason that the evidence of George Warner, named in the court of the indictment upon which the defendant was found guilty, was found by the Court to be perjured evidence.

(Ab. of Rec., p. 46, pgh. XV, F. 40).

(See Bill of Exceptions, Ab. of Rec. p. 64, pgh. IX, F. 56).

The plaintiff in error also filed a motion in arrest of judgment. (See Ab. of Rec., pp. 34 and 35) which was denied by the Court. (See order of the Court, Ab. of Rec. pp. 47-48). This motion should have been granted upon the authority of United States vs. Goodwin, 20 Fed. 327, for the reason that the Act approved December 17, 1914, as amended by the Act of Congress approved February 24, 1919, was repealed by Act of Congress approved November 23, 1921, to become effective January 1, 1922, by Section 1400, Title XIV, General Provisions of the Revenue Act. (42 U. S. Statutes at Large, Section 1400, pp. 320-321).

This assignment was not incorporated in the petition for a writ of error, nor in the bill of exceptions, but, inasmuch as it appears upon the face of the record, we respectfully request the Court to consider it, for the reasons hereinafter set forth, although the argument upon the asignment of the error of the court in refusing to grant the motion for a new trial, and the authorities in support

thereof, hereinafter cited, apply with equal force to this asignment.

Again referring to the motion for a new trial, which was overruled, as before stated, there is a more potent reason why this motion should have been granted, and that is the fact that the indictment in this case does not state facts sufficient to constitute a public offense. This question was first raised by demurrer, (Ab. of Rec. pp. 15 and 16), which was overruled by the Court (Ab. of Rec. pp. 17) and an exception to the ruling duly noted. The demurrer to this indictment should have been sustained, and the failure of the trial Court to do so constitutes reversible error.

The motion in arrest of judgment should have been granted, and the refusal of the Court to do so also constitutes reversible error.

We have observed, in passing, that the indictment in the present ease differs from the indictments in the cases previously cited—wherein convictions have been sustained, or where rulings adverse to the accused have been made by the Courts of last resort—in many, if not all, of the essential elements. The indictment before the Court differs from the indictments in those other cases not only in form, but in substance as well. In other words: It charges no offense whatsoever, and falls considerably short of the requirements of the Federal

Penal Code upon the question of the sufficiency of indictments.

It has been held that; "it is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of a future prosecution of the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.

U. S. vs. Behrman, 258 U. S. 279, (66 L. Ed. 619).

It cannot be truly said that the indictment in the case at bar measures up to the standard required by the Federal Penal Code, nor does it meet the requirements of the rule of law laid down in the case just cited. In fact, no offense being charged, it follows that if judgment of conviction against the plaintiff in error is allowed to stand, he could, after having suffered the punishment imposed by the trial Court, be again brought before the bar of the same court for another trial upon the identical state of facts, under an indictment charging, in proper form, a violation of the Harrison Narcotic Drug Act, and he could not plead the judgment of former conviction in bar of such future prosecution. We do not charge the government officials with any de-

sire to commit any such act of injustice toward the plaintiff in error, on the contrary, we disclaim any such intention on their part, but, nevertheless, that is exactly what might be done.

The Jin Fuey Moy case (U. S. vs. Jin Fuey Moy, 254 U. S. 189, 65 L. Ed. 214), was referred to in a previous assignment (XIV), but on another point. We now respectfully direct the attention of the Court to the indictment in that case, for the purpose of a comparison between it and the indictment in this case, upon the question whether or not a public offense is charged and upon the sufficiency of the indictment in general.

In the Jin Fuey Moy case, the indictment alleged, among other things that: "the defendant was a practicing physician and did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away, certain derivatives and salts of opium, to-wit, . . . . a quantity of morphine sulphate to . . . . . not in the pursuance of a written order . . . . . in that said Jin Fuey Moy . . . . did issue and dispense . . . a certain prescription . . . . and that said morphine sulphate was dispensed and distributed by said Jin Fuey Moy . . . . contrary, etc."

In other words: Jin Fuey Moy was charged with a direct sale of morphine sulphate, and also with the issuance and dispensing of a prescription, whereas, in the case at bar no sale whatever is charged. The indictment simply charges that he

"did then and there unlawfully, wilfully, knowingly, and feloniously and contrary to the Act of Congress . . . . . issue, write and deliver a prescription . . . . with the intent and purpose to dispense, distribute, barter and sell such narcotic drug

. . . . ." Thas is, that the defendant (Aiton) did issue, write and deliver a prescription, with the intent and purpose to dispense, distribute, barter and sell the drugs, which is an entirely different thing from charging that he actually sold and dispensed them. A person might intend to do a certain thing, or to commit a violation of law, but so long as there is no execution of the intention or purpose, there can be no criminality, under a form of indictment such as the one in question. It must be borne in mind that the plaintiff in error here is not charged with a conspiracy to violate the law, as was the fact in the Webb and Goldbaum case.

In the latter case (Webb vs. U. S. 249 U. S. 86, 63 L. Ed. 497), while the record apparently does not contain a copy of the indictment, yet it does show that; "it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks, (Section 1 of the Act) for a prohibited purpose, and the record further discloses that these persons were charged with a conspiracy.

In the Doremus case, (U. S. vs. Doremus, 63 L.

Ed. 493) also, a direct sale of narcotic drugs was charged, the indictment alleging, in substance, that: Doremus, a physician, . . . . did unlawfully, fraudulently and knowingly sell, give away and distribute to one Ameris a quantity of heroin . . . . ."

The second court in the Doremus indictment charges, in substance, that: "Doremus did unlawfully, and knowingly sell, dispense, and distribute to one Ameris five hundred one-sixth grain tablets of heroin . . . . . and that Doremus did sell, dispense and distribute the drug heroin to Ameris for the purpose of gratifying his appetite for the drug . . . . ."

The allegations of the indictment in the case at bar are vague and indefinite; too much so to enable the defendant to know the precise nature of the offense with which he is sought to be charged. In the first place, it does not clearly appear upon what date the offense is alleged to have been committed, if the date of the commission of the offense is alleged. The indictment charges, in part, that: "R. A. Aiton, a practicing physician, within the District and Jurisdiction aforesaid, and fully registered with the Collector of Internal Revenue . . . . under the provisions of the Act of Congress of December 17, 1914, as amended, on the 18th day of October, A. D. 1921, and within the said District of Arizona, did then and there unlawfully, wilfully, knowingly and feloniously and contrary to the act

of Congress, . . . . . issue and write and deliver a prescription . . . . "

The indictment is headed: "Viol. Sec. 1, Act of Dec. 17, 1914, as amended, by Act of Feb. 24, 1919, issuing prescriptions for morphine and cocaine not in good faith and in the course of his professional practice only."

But, the significant thing is that, regardless of whether it was intended to charge a violation of section 1 or of section two of the act, no violation of either section is charged with sufficient clearness to show a violation of law and to put the defendant on notice of the nature of the accusation against him in order that he might properly prepare his defense. It would appear that "good faith" is an essential element (or at least the government officials so deemed it) of the indictment, yet, when he comes into Court prepared to meet that issue he is denied the right as pointed out in a previous assignment.

The question naturally arises: May a practicing physician duly registered . . . . and strictly in the course of his professional practice issue a prescription to a bona fide patient who comes to him for treatment for a chronic disorder if that patient be at the same time a drug addict

Or was it the intention of Congress to prohibit the issuance of narcotic drug prescriptions in all cases regardless of the circumstances or conditions?

It seems to us that the first question must be answered in the affirmative and the second question in the negative.

That being the case, another question arises, and that is: What is the maximum amount for which a physician may write a prescription for a bona fide patient (even though he be a drug addict) in the course of professional treatment?

To that question one expert might give one answer, and another expert another answer—one, a larger dose, another a smaller one—no two experts would agree. Consequently, it is left to the Court and jury to determine what is the standard of guilt in each separate case before them, and therein lies the harm. Furthermore, it is in violation of the constitutional rights of the accused. This precise point (under a different act of Congress) was decided in the case of the United States vs. Cohen Grocery Company, 255 U. S. 680 (65 L. Ed. 517) a case arising under the Lever Act of August 10, 1917, for alleged profiteering, wherein it was held that: "Congress in attempting to punish criminally any person who wilfully makes "any unjust or unreasonable rate or charge in handling or dealing with any necessaries" violated U. S. Constitution, 5th and 6th Amendments, which require an ascertain standard of guilt, fixed by Congress, rather than by Court and juries and secure to the accused persons the right to be informed of the nature and cause of the accusations against them".

There was no ascertained standard of guilt fixed by Congress in the Lever Act, nor is there in the Harrison Narcotic Drug Act, that we have been able to find in our investigation of the latter act for that purpose.

Before going into the question of the sufficiency of the indictment any further, we desire to again refer to assignment VIII, wherein error is predicated upon error of the trial Court in failing and refusing to give an instruction with reference to prescriptions to bona fide patients, involving the question of good faith.

It has been held in some cases arising under the prohibition act that "Inasmuch as the indictment alleged that the defendant issued the prescription upon which the first count was based, "not in good faith" it was error not to instruct the jury upon the question of good faith of the defendant."

Lambert vs. Yellowley, 291 Fed. 640.

U. S. vs. Freund, 290 Fed. 411.

The attention of the Court is respectfully directed to the language in that part of the indictment in this case alleging that the prescription was not issued in good faith for meeting the immediate needs of George Warner, not to effect a cure of the said George Warner in the course of his professional practice only . . . .

While it is not argued that this language was essential to the sufficiency of the indictment, nevertheless, since the same was alleged and read to the jury as a part of the offense with which the defendant was charged, the defendant was entitled to have the above instruction given to the jury in his behalf. Congress, through the Harrison Narcotic Act does not forbid the use of morphine sulphate as a therapeutic agent, but on the other hand recognises its extensive use, if not value, in medical practice, the faith of a large part of professional people therein, and Congress sanctions its continued use, whether or not it could have prohibited it altogether. If therapeutics were an exact science, if diseases and their courses were of determined diagnosis and invariable prognosis, if patients were constructed alike, if remedies could be measured by fixed rule, a fixed dosage could be followed.

But since in respect to all of these factors the truth is otherwise, every patient presenting to the physician a different problem for solution, the defendant in this case was entitled to have the jury instructed with respect to its findings upon the question of the good faih of the defendant in issuing the prescription upon which he was convicted in the first count of the indictment.

Inasmuch as the indictment in the present case alleged that the defendant issued the prescription upon which the first count was based, "not in good faith", it was error not to instruct the jury upon

the question of the good faith of the defendant.

Returning to the question of the sufficiency of the indictment in the case at bar (Assignment XV). It has been held that "An indictment for a violation of the provisions of the Harrison Anti-narcotic Act, December 17, 1914, against selling narcotic drugs to persons not having written orders need not charge that the defendant sold the inhibited drugs knowing them to be such, the statute not making such knowledge an essential element of the offense."

U. S. vs. Balint, 258 U. S. 250 (66 L. Ed. 604).

In the case just cited it is apparent that a sale of narcotic drugs was charged in the indictment, whereas, in the present case no sale is charged—simply the issuance of a prescription with the intent to sell * * *—a different matter entirely. So it is with all the cases previously cited, wherein convictions have been sustained; therefore, we reiterate that there is a vast distinction between those cases and the present one.

The indictment in the case at bar falls short of the requirements of the Federal Penal Code in that it does not describe the offense sought to be charged with sufficient clearness, or degree of particularity, to put the accused on notice of the nature of the accusation against him.

It has been held that: "An indictment for a

statutory offense need only charge facts sufficient to show that the accused is not within any exception in such statute."

U. S. vs. Behrman, 258 U. S. 280 (66 L. Ed. 619).

In the present case it clearly appears that the plaintiff in error comes within the exceptions mentioned in the Act, and that, therefore, he could not be legally convicted, even though he committed all of the acts with which he was charged in the indictment.

In the case of the United States vs. Reynolds, 244 Fed. 991, it was held: "That the Harrison Law (Act of December 17, 1914) requires nothing of physicians issuing prescriptions for opium save that they be registered, and the prescriptions be signed * * *. "By giving a prescription, the physician does not 'dispense' opium, in the sense of the word as used in said law. As used therein, 'dispense' relates to actual delivery of the drug by the physician to the patient, from the former's office supply, generally, although not excluding other actual delivery." As defendant is not charged with having failed to so register or to sign the prescription, he is not accused of any offense or violation of said law."

In the same (Reynolds) case we find this language by the Court: "In said law there is nothing

prescribing quantities or forbidding prescriptions for the drug in any quantity. Any attempt to find therein by construction or implication does violence to the elementary principle that, when legislatures undertake to create offenses, it must be by language clear and definite, making it obvious to ordinary intelligence that by certain conduct an offense, and the offense denounced by the statute, is committed. "Hence such construction or implication is never permitted."

We are aware that the decision in the Reynolds case is in conflict with some of the later cases, as to some of the questions raised, but, nevertheless, it is in harmony with those very cases upon the question of the construction of criminal statutes and the interpretation to be placed on them. This (Reynolds) case is also cited because it contains a judicial interpretation and definition of the term "dispense" —a term which is used in the case at bar. But, in the present indictment it is not even charged that the defendant dispensed the narcotic drug, but simply issued the prescription "with the intent and purpose to dispense, distribute, barter and sell such narcotic drugs * * *."

In the Jin Fuey Moy case (254 U. S. 189)—(which at first sight appears to be against the contention of the plaintiff in error in the present case, as to some of the points raised)—the Court said: "Manifestly, the phrases, 'to a patient' and 'in the course of his professional practice only', are in-

tended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A prescription issued for either of the latter purposes protects neither the physician who issues it, nor the dealer who knowingly accepts and fills it." Other cases to the same effect are:

Melanson vs. United States, 256 Fed. 783;

Thompson vs. United States, 258 Fed. 196;

Saunders vs. United States, 260 Fed. 386;

Friedman vs. United States, 260 Fed. 388;

Doremus vs. United States, 63 L. Ed. 493.

But, in all of the above cases, it is apparent that the defendants were charged in the indictments with actual sales, and of dispensing or distributing the drugs, and not with the offense of issuing, writing and delivering prescriptions "with the *intent* and purpose to dispense, distribute, barter and sell", only.

We stated in one of the opening assignments that inasmuch as the constitutionality of the Harrison Narcotic Drug Act had been upheld in the Doremus

case, we were not concerned with that question in this case. We still adhere to that opinion insofar as it is applicable to the present case upon the questions raised, but it will be observed that in the Doremus case the constitutional question was before the Court upon a different phase of the case from that presented here and, therefore, is not decisive of this case.

The Doremus case involved the question of the constitutionality of the Act as a revenue measure, and it was upheld.

The United States Constitution, 5th Amendment, provides, among other things: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *."

The 6th Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to be informed of the nature and cause of the accusation * * *."

We respectfully contend that both of these constitutional provisions were violated, in that the plaintiff in error may be again placed in jeopardy for the same offense, owing to the fact that he could

not plead a former conviction in bar of another prosecution for the same offense—the indictment not charging a public offense—and for the further reason that he was not informed, by the indictment, of the nature and cause of the accusation against him. This case should be reversed if for no other reason than that the constitutional rights of the plaintiff in error were violated.

Another question which we have not heretofore raised is that of the indictment in this case charging more than one offense. It will be observed that the indictment contains nine different counts, alleging the issuance of prescriptions for narcotic drugs to that many separate and distinct persons, all on different date—ranging from October 18th, 1921 (if that is the date intended to be charged in the George Warner (first) count, to the prescription issued on February 9, 1922, as alleged in one of the last counts, and the Harrison Act had been amended in the meantime, as previously pointed out in an earlier assignment.

To briefly summarize some of the more important points, without waiving any of the others, we submit that the trial Court erred in the following respects: First. In overruling the demurrer of the plaintiff in error to prescriptions illegally seized, and the motion to suppress such evidence. Second, In the admission in evidence of such prescriptions. Third, In the admission in evidence of other prescriptions dated two months after the indictment.

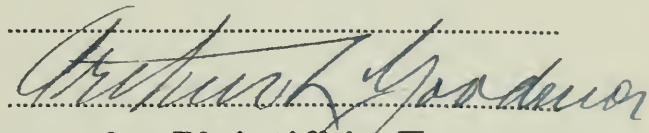
Fourth, In the rejection of evidence offered by plaintiff in error, to show the establishment of a clinic, under the approval of which the prescriptions were issued. Fifth, In refusing to give the instructions requested with reference to the issuance of prescriptions to bona fide patients. Sixth, In excluding evidence offered to show that the prescriptions in question had been approved by a United States narcotic officer. Seventh, In announcing in the presence of the jury that the rule laid down in the Webb and Jin Fuey Moy cases would be applied to this case, and in permitting the United States Attorney to proceed under that theory, when the cases were dissimilar. Eighth, In overruling motion of plaintiff in error for a new trial, for the reason that the conviction was procured by means of perjured evidence, and for the further reason that the indictment does not state facts sufficient to constitute a public offense. Ninth, In overruling motion in arrest of judgment, not only because the indictment does not state sufficient facts, generally, but for the further, and more specific, reason that the indictment does not describe the offense sought to be charged with sufficient clearness to enable the accused to know the nature and cause of the accusation against him, so that he could plead the judgment in bar of a future prosecution for the same offense, and by reason of which the plaintiff in error was illegally convicted, and his constitutional rights were violated.

In conclusion, we submit that the errors complained of are not technical, merely, but grave; that the commission of them affected the substantial rights of the plaintiff in error, and resulted in his illegal conviction.

We respectfully submit that the plaintiff in error did not have a fair and impartial trial, nor was substantial justice meted out to him, for which reasons the case should be reversed.

Respectfully submitted,

BENTON DICK,



Attorneys for Plaintiff in Error.

IN THE

# United States Circuit Court of Appeals

FOR THE

# Ninth Circuit

R. A. AITON,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

No. 4357

# Brief of Defendant in Error

Geo. T. Wilson,
Assistant United States Attorney,
For Defendant in Error.

Filed this.....day of February, 1925.

.....

*Clerk, U. S. Circuit Court of Appeals.*

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*Defendant in Error.*

No. 4357

## BRIEF OF DEFENDANT IN ERROR

## STATEMENT

Before presenting our argument on the various assignments of error, we desire to correct one or two slight misstatements appearing in the, "Statement of the Case", in the Brief of Plaintiff in Error.

In the first place, this case does not involve a violation of Section 1 of the Harrison Act, (Brief of plaintiff in error, page 1). But the plain allega-

tions of the indictment indicate clearly a violation of Section 2, and the record in the case, or as much thereof as is before this Court, will so establish.

It will be noted that the evidence has not been preserved in the record and is not before this Court. Hence, we cannot agree with the statement made by plaintiff in error, that:

"The record discloses the fact that numerous errors were committed by the trial court in the admission of incompetent and illegal evidence of a highly prejudicial nature, offered by the Government, and in the rejection of competent, legal evidence, offered by the defendant, tending to show good faith in the issuance of the prescriptions in question, and the lack of any criminal intent, although no specific intent to violate the law need be shown in this class of cases". (Brief of plaintiff in error, page 4.)

Certainly no presumption can arise from the omission of the evidence, other than, that the trial court followed the law, and that the court's rulings on the admissibility of evidence are correct. In fact, we fail to see how this Court can consider at all those assignments of error which are predicated upon the rulings of the court admitting or rejecting evidence during the progress of the trial.

We do not deem it necessary to argue each assignment by itself, in as much as there appears to be considerable repetition, and relation of the ques-

tions involved, among the various assignments. Therefore, in presenting our argument, we have grouped those assignments, which, although differently worded, present practically the same question.

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## ARGUMENT

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### ASSIGNMENTS I, II, III, IV.

These four assignments question the legality of the methods employed by the Government agents to obtain possession of the so-called prescriptions, and the correctness of the court's ruling admitting the prescriptions in evidence.

From the Motion to Suppress Evidence filed by plaintiff in error, and his affidavit attached thereto, (T. of R., page 18, 20), it appears that the prescriptions in question—nearly a thousand in number, written over a period of approximately six months, and all for narcotic drugs—were all filled at one drug store and in the possession of the druggist in his store at the time of their seizure. The narcotic officers, without warrant, took the prescriptions from the possession of the druggist in his store at about the time the plaintiff in error was arrested. Later, and at the trial, the prescriptions so seized were offered and received in evidence.

These facts and circumstances, plaintiff in error contends, constitute a violation of his constitutional guarantee of security in his person and effects against unreasonable search and seizure. And in support of his position, he cites Silverthorne Lumber Company v. United States, 251 U. S., 385, (Brief of plaintiff in error, page 18). The facts in the two cases are totally dissimilar. In the case cited, the search was of the office of the lumber company, and the articles seized were the company's private books, papers and documents in its possession.

In the instant case, however, there was no invasion of any premises owned, controlled or occupied in any manner by plaintiff in error. The prescriptions seized, although written by him, were the property, and in the possession, of the druggist. If any person had grounds for objection to the seizure, it was the latter, and not one who was a stranger to the premises invaded.

Chicco et al v. United States, 284 Fed. 434, 436, (C. C. A. 4th Circuit).

In addition to these facts, the prescriptions seized were not strictly personal or private effects within the meaning of the constitutional provision invoked by the plaintiff in error. They were, in the light of the established law, in the nature of quasi-public records, subject to inspection in the hands of the druggist at all seasonable hours by the agents of the Government. Article 124 of the Treasury De-

partment Regulations No. 35, issued by the Treasury Department, dated November 24, 1919, and signed by Daniel C. Roper, Commissioner of Internal Revenue, and approved by Carter Glass, Secretary of the Treasury, provides:

"Dealers who fill prescriptions are required to keep them in a separate file for a period of two years in such manner as to be readily accessible to inspection by investigating officers".

See, United States v. Mulligan, 268 Fed. 893, 895, (D. C., N. D., New York), and the cases cited therein.

In view of the circumstances surrounding the seizure of the prescriptions, their quasi-public nature, and the decisions of our courts on the question, we seriously contend that the trial court did not err in denying the Motion to Suppress and in admitting the prescriptions in evidence.

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## ASSIGNMENTS V, VI.

In these assignments, the Court is given to understand that the Government attempted to prove its case by the introduction in evidence of prescriptions written by plaintiff in error after his indictment by the Grand Jury. This is clearly a perversion of the facts. The record pertaining to this matter is this, the plaintiff in error was arrested on a Com-

missioner's warrant about February 28, 1922, and immediately admitted to bail, and that about May 1, 1922, he was indicted. During the interval of about two months which elapsed between the date of his arrest and the finding of the indictment, he wrote several hundred more prescriptions, and these prescriptions are the ones referred to in Assignments of Error V and VI.

We do not conceive how this Court can consider these two assignments in the present state of the record, in as much as the error, if any exists, can be disclosed only by a transcript of the evidence. In the absence of that, we do not believe this Court can safely say that this evidence, standing alone and unrelated to the other evidence, was inadmissible.

It is a familiar rule of criminal law, "That, if intent or motive be one of the elements of the crime charged, evidence of other like conduct by the defendant at or near the time charged is admissible." On this theory, it was held in Dysart v. United States, 270 Fed. 77, 79, (C. C. A. 5th Circuit), and again in Harris v. United States, 273 Fed. 785, 791, (C. C. A. 2d Circuit), that when a physician is charged with selling narcotic drugs by prescription, proof of numerous other prescriptions written by defendant is admissible to show intent.

But the Bill of Exceptions indicates (T. of R., page 60, Exception 1), that the court admitted the prescriptions in question to rebut the evidence,

given by plaintiff in error in his effort apparently to establish his good faith, that upon his arrest and the knowledge thus imparted that he was violating the law, he immediately desisted from writing further prescriptions.

The Harrison Act and the regulations made pursuant thereto provide that every physician shall keep a record of narcotics dispensed by him subject to inspection by the Federal officers. If the distribution of the drug is made by the physician from his office supply, the record thereof is kept by him, but if dispensed by prescription, the record (prescription) is retained by the druggist. (Article 124, Regulation 35, of the Treasury Department.) In either event, it is a record of the drugs sold and distributed by the physician or his order.

The question then presented by these two assignments of error is, can this record be adduced against the physician in rebuttal to his own testimony? In Sims v. United States, 268 Fed. 234, 236, the Circuit Court of Appeals for the Eighth Circuit decided this question in the affirmative. Said the court in that case:

"The final assignment as to the admission of evidence is that Sims, on cross-examination, was required to exhibit the record of his disposition of narcotics. This was the record required by law to be kept. Whatever the weight of this testimony, its competency is clear on the issues both of good

faith and of the character of business conducted by Sims."

From this authority, and the quasi-public nature of the record required by law to be kept, it seems that the entire records of a physician pertaining to his distribution of narcotics is admissible against him by way of rebuttal to his testimony.

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## ASSIGNMENT VII.

This assignment and the exception noted in the Bill of Exceptions (T. of R., page 60, Exception 2) are apparently too frivolous to admit of an answering argument. The question involved is one of those this Court is asked to pass upon in the absence of the evidence, but which can be correctly determined only after reviewing the evidence which led to the question. It is not suggested in either the assignment, or the Bill of Exceptions, that the question so asked by the trial judge was not relevant and material and therefore improper. Suffice to say, we know of no rule of law that precludes a judge from propounding a question to a witness during the course of a trial.

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## ASSIGNMENTS VIII, IX, XI.

These assignments are in the same category with others which depend for their correct determination

upon the other evidence in the case. However that may be, we are fully convinced that, in view of the language of the offer as made by plaintiff in error during his trial, and the authorities on the question, the trial court did not err in rejecting this offer.

Was the offer as shown by the Bill of Exceptions (T. of R., pages 61, 62, 63, Exceptions 3, 4, 6) sufficient to render it admissible, even on the theory that it tended to establish the good faith of the plaintiff in error, or that it, in any way, constituted a defense?

Did the offer include a showing that all of the prescriptions, and particularly those mentioned in the indictment, were written pursuant to the so-called clinic? Reading from Exception 6 as contained in the Bill of Exceptions, (T. of R., page 62), we find: "Defendant offered to show that many of the prescriptions introduced in evidence by the Government were written by the defendant under and pursuant to a clinic created by certain parties for the purpose of guarding and guaranteeing the lawful use of narcotic drugs administered to those suffering from chronic or incurable disease."

Did the offer include a showing that all of the forty or fifty drug addicts receiving their supply of drug from plaintiff in error, and particularly those mentioned in the indictment, were put under

his care by the clinic? We find from an inspection of the Bill of Exceptions (T. of R., page 61, Exception 3), that: "They concluded that the known addicts should be referred to one doctor and kept under his care and treatment."

Did the offer include a showing that the plaintiff in error had been designated as the one doctor to administer to the drug addicts receiving treatment from the so-called clinic? If so, the Bill of Exceptions is silent on that point.

In short, the offer fell far short of showing any evidence that was really material or relevant to the issues of the case, or that in any manner constituted a defense. But it is insisted that had the court admitted the evidence thus offered by plaintiff in error, his good faith would have been established. There are many respectable authorities to the effect that the good faith of the accused is one of the issues involved in this class of cases. And this doctrine has been generally recognized and followed. However, by a very recent pronouncement of the Supreme Court of the United States it seems this defense is not available to the accused.

United States v. Balint et al, 258 U. S. 250, 252, 254. Speaking through Mr. Chief Justice Taft in that case, the Court said:

"It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due

process of law. But that objection is considered and overruled in Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se. —Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."

In view of the failure of plaintiff in error to include in his offer, evidence material and relevant to the issues of the case, we respectfully submit that no error was committed by the court below in rejecting the so-called offer.

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## ASSIGNMENT X.

In considering this assignment, we are again confronted by a deficient record.

Can it be shown in the absence of the evidence,

that there was any evidence introduced during the trial of the case as a foundation for the requested instruction? But admitting that there was sufficient evidence to justify an instruction of this kind, can it be shown, in the absence of the complete charge, that the jury in this case were not instructed substantially as requested by plaintiff in error. It is too elementary to admit of argument that unless the complete charge is in the record, the court will not reverse a case because of an apparent error in giving or failing to give a particular instruction.

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## ASSIGNMENTS XII, XIII.

In the absence of the evidence, it is not apparent on what grounds the court excluded the evidence mentioned in these assignments. For that reason, we again offer our objection heretofore noted, namely, that with only a portion of the record before the court, a proper determination of the questions involved in these two assignments cannot be had.

However, we do not wish to be understood as admitting there is any merit in these assignments.

From our examination of the Bill of Exceptions, (T. of R., page 62, Exception 5), it is apparent the plaintiff in error proposed to show that the prescriptions after being filled were inspected by a

narcotic agent and his approval or O. K. endorsed thereon. This evidence he contends would have established his good faith in issuing the prescriptions in the first instance. We fail to understand how anything done by a narcotic agent after the commission of the offense would, in any manner, change the circumstances under which the prescriptions were written and delivered to the addicts.

In Thompson v. United States, 258 Fed. 196, 202, (C. C. A. 8th Circuit), a letter written to the defendant by the Commissioner of Internal Revenue was offered in evidence by the defendant on the grounds it tended to establish his good faith. The court held that the letter had been properly excluded.

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## ASSIGNMENT XIV.

The wording of this assignment and of the Bill of Exceptions do not agree as to the exact ruling of the trial court. (T. of R., page 63, Exception 7). In the Bill of Exceptions, it will be noted that the trial court announced "—that the rulings laid down by the Supreme Court of the United States in the case of United States v. Webb and the United States v. Jin Fuey Moy would be applied in this trial—".

In other words, the trial court merely said that the law as it was interpreted, would be applied to the trial of the instant case.

This, we submit, is what every court should do.

## ASSIGNMENT XV.

We again challenge the accuracy of the wording of the assignment. Nowhere does the record disclose, other than in the assignment of error itself, that the court ever found that the witness, George Warner, had perjured himself. If the court had so found, we feel safe in saying that this case would not now be here, but that a new trial would have been promptly granted in the District Court.

It is true, plaintiff in error had attached to his Motion for New Trial what purported to be an affidavit of the witness, George Warner, admitting his perjury. (T. of R., page 30). It is true also, that shortly after executing the affidavit attached to the Motion for New Trial, he signed another affidavit in the presence of witnesses denying that he had sworn to the first affidavit and denying that certain matters contained in his first affidavit were true. (T. of R., page 37). If the entire record of this particular portion of the proceedings had in the court below was before this Court, a different light entirely would be shed upon this incident.

As the prosecuting officers in this case, we desire to say that the conviction of defendant in error was not obtained through perjured evidence, or even questionable evidence. The question presented by this assignment, however, will be decided by this Court strictly on the law applicable thereto, and to that end we cite the Court to a similar case in,

Glenberg v. United States, 281 Fed. 816, 817.

We note in the brief of plaintiff in error that he asks this Court to consider the Motion in Arrest of Judgment. The motion is based on the ground that the Act approved December 17, 1914, and commonly known as the Harrison Act, has been repealed.

The original act of 1914 was amended by the Revenue Act of 1918, approved February 24, 1919. (Sections 1006, 1007, 1008, Title X, 40 Statutes at Large, pages 1130, 1131, 1132). However, the amendment affected only Sections 1, 6 and a portion of Section 12 of the original act leaving intact Section 2, which is the portion of the statute under which the indictment is brought. By the provisions of Title XIV of the Revenue Act of 1921, approved November 23, 1921, the above amendments to the Harrison Act contained in the Revenue Act of 1918 were repealed. (Revenue Act 1921, Title XIV, 42 Statutes at Large, pages 320, 321). This repeal, however, did not affect the provisions of Section 2 of the Harrison Act. Hence, the Motion In Arrest of Judgment was properly denied.

We direct this court's attention to the fact that the sufficiency of the indictment in the case at bar has not been challenged by any of the assignments of error in the record. Likewise, the insufficiency of the indictment was not assigned as one of the grounds in either the Motion for New Trial or Mo-

tion in Arrest of Judgment. Suddenly, however, we are confronted by an extensive argument against the sufficiency of the indictment presented in the brief under an assignment of error to which it bears not the slightest relation.

Even though the insufficiency of the indictment was not properly assigned as error, we are fully aware that by a recent enactment of Congress amending our judicial code, and the rules of this Court, this matter may be properly considered by the Court at this time.

But, be that as it may, we submit that the indictment in this case meets all the requirements of a good pleading, that its plain allegations charge a crime within the language of the statute, that plaintiff in error could not have been misled to his prejudice in preparing and offering his defense and that the matters charged in this indictment could be safely pleaded in bar of another prosecution.

In closing, we respectfully urge upon this Court that substantial justice has been done and that the judgment of conviction of the District Court should be affirmed.

Respectfully submitted,

Geo. T. Wilson,
Assistant United States Attorney,
For Defendant in Error.